(16,826.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 263.

THE LOUISVILLE TRUST COMPANY, PETITIONER,

vs.

THE LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY COMPANY ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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IN THE

CIRCUIT COURT OF THE UNITED STATES

FOR THE DISTRICT OF INDIANA.

THE FARMERS' LOAN AND TRUST COMPANY,
No. 9,401. *v.*
THE LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY COMPANY, ET AL.

INTERVENING PETITION OF LOUISVILLE TRUST COMPANY.

Pleas of the Circuit Court of the United States within and for
1 the District of Indiana, begun and holden at the United States
Court House in the City of Indianapolis in said district on the
first Tuesday of November, in the year of our Lord One Thousand
Eight Hundred and Ninety-seven, before the Honorable William
A. Woods, Judge of the Circuit Court of the United States, for the
District of Indiana.

The Farmers Loan and Trust Company and John H. Barker,
vs.
The Louisville, New Albany and Chicago Railway Company, The Central Trust Company of New York; John H. Stotsenburg and James Murdock.
No. 9401. Chancery.

Be it remembered that heretofore, to-wit: at the May Term of said court, on the 24th day of August, 1896, before the Honorable William A. Woods, Judge of said court, the following proceedings in the above entitled cause were had, to-wit:

Comes now the complainant by Henry Crawford and William R. Crawford, his solicitors, and files his Bill of Complaint herein, in the words following, to-wit:

To the Honorable Judges of said Court sitting in Equity.

om-
John
Jr.

John T. Mills, Jr., a citizen of the State of New York, exhibits this bill of complaint against the Louisville, New Albany and Chicago Railway Company, a corporation organized and existing under the laws of the State of Indiana, and thereupon shows to the court as follows:

2 1. The said defendant, the Louisville, New Albany & Chicago Railway Company, is a corporation duly incorporated and existing under the laws of the State of Indiana with corporate capacity to own and operate a particular line of railroad in said State and also to acquire, lease and operate additional lines of railroad in that and other States.

2. As thereto authorized by the Statutes of Indiana, and its articles of incorporation, it owns the following lines of railway in Indiana, viz.: a main line extending from the city of New Albany to Michigan City, being 289 miles long, and a division extending from the city of Indianapolis to the western boundary line of the State of Indiana at Hammond, being 162 miles long.

It also leases or has trackage rights over the Chicago & Western Indiana Railroad from said last named city of Hammond to and into the city of Chicago, Illinois, and over the Pittsburg, Cincinnati & St. Louis Railway and the tracks of the Louisville Bridge Company and the Louisville & Nashville Railroad from the city of New Albany to and into the city of Louisville, Kentucky.

It is thus enabled to and does operate through and continuous trains from Louisville, Kentucky, and Indianapolis, Indiana, to and into the city of Chicago and also Michigan City, and it has also acquired the ownership or leasehold interest of valuable passenger and freight stations, tracks and terminal facilities in the cities of Chicago and Indianapolis.

Such defendant corporation also owns the entire stock of the Bedford & Blomfield Company, extending from Bedford to Switz City, 41 miles, and of the Orleans, West Baden and French Lick Railroad Company, extending from Orleans to French Lick,
3 about 18 miles.

Bill of Co plaint of T. Mills,

The system of railroad thus owned, operated and controlled, embraces 537 miles of main line and over 130 miles of sidings over and upon which the defendant has for many years operated trains for the transportation of passengers, freight, express matter and United States mails and performing all the duties of a pubilc carrier of domestic and interstate commerce.

3. Besides owning a large amount of engines, cars, machinery, tools and supplies which the defendant uses in operating its system of railroads, it owns the entire capital stock of its two branch roads and $1,000,000 of the capital stock of the Chicago & Western Indiana Railroad Company and $240,000 of the capital stock of the Chicago Belt Railroad Company, but all such four classes of stock have heretofore been pledged by the said defendant railway company as a security for certain issues of its mortgage.

4. The capital stock of the defendant corporation is $16,000,000. . . . ., of which $7,000,000. . . . . is preferred in the payment of any dividends.

Its outstanding fund debt is in five classes.

(1) $3,000,000. six per cent. bonds secured by a first mortgage upon the main road between New Albany and Michigan City, 288 miles, together with the equipment, appurtenances and franchises thereto belonging.

(2) $4,700,000. six per cent. consolidated bonds secured by a mortgage upon the entire railroad owned and controlled and the equipment, appurtenances and franchises thereto belonging and all the corporate stocks belonging to said mortgagor and
4 heretofore specified.

(4) $2,800,000. five per cent general mortgage bonds secured by a lien upon the entire railroad, equipment, appurtenances, franchises and stocks.

(5) $1,000,000. five per cent. equipment bonds secured by a first mortgage upon and title to a large amount of equipment particularly described in such mortgage and also by junior lien upon the entire railroad equipment, appurtenances, franchises and stocks aforesaid.

5. The fixed charges for interest and sinking fund upon the debt of the defendant, rentals and taxes amounts to about $1,200,000 per annum, involving a monthly charge of about $100,000.

6. Relying upon the expectation of increased traffic and larger gross and net revenue therefrom, the defendant corporation has during the last two years made large expenditures in improving its road and enlarging its facilities, by erecting extensive machine and repair shops at Lafayette, new and independant freight yards, tracks and building at Indianapolis, laying new and heavier steel rails in its main track, increasing side tracks and renewing bridges on its main line, changing the railroad from Bedford to Switz City to standard guage and purchasing additional machinery, tools and equipment.

A large part of the cost of such improvements and additions were paid for with money borrowed upon the credit of said defendant, and it now owes a floating debt created for that and other necessary corporate purposes of nearly $1,000,000. all which is now outstanding and unpaid and represented by the notes and other obligations of said defendant held by complainant and other bona fide creditors.

7. On August 24th, 1896, the complainant, by the consideration of this court, duly recovered a judgment against the said defendant railway company for the sum of $494,911.35 and costs of suit upon divers notes executed to complainant by the said corporation for borrowed money, which judgment is in full force unpaid.

An execution has been sued out upon such judgment directed to the marshal of this district and by him returned unsatisfied and no property found subject to levy.

8. In 1889 and 1890 the then board of directors of the defendant corporation without any authority from the stock holders of such company and contrary to law and without any valid or valuable consideration therefor placed upon each of the $1,185,000. six per cent. first mortgage bonds issued by a corporation of Kentucky called the Richmond, Nicholasville, Irvine & Beattyville Railroad Company an endorsement singed by the defendant corporation whereby it obligated itself "for value received" to guarantee to the holder of such bond the payment of the principal and interest of such bond according to its terms.

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T. Mills,

After such guarantee of payment was, contrary to law and without any real consideration, placed upon such $1,185,000. bonds, such securities were delivered to the parties interested in the construction of such Kentucky railroad and were sold and hypothecated to divers holders.

Such Kentucky railroad has never been completed, no inter-
6 est on the guaranteed bonds has ever been paid, and such
coupons in default amount to over 42 per cent., and the holders of such bonds assert that the principal of the bonds, according to the conditions thereof, have become due by reason of the default in interest payment.

The said Beattyville railroad is hopelessly insolvent, it has been decreed to be sold for the payment of a large amount of construction debts as first liens, which aggregate a sum exceeding the real or saleable value of the incomplete road and in effect render the bonds worthless so far as the primary mortgage security therefor is concerned.

As soon as the stockholders of the defendant corporation were informed of the action of their directors in placing such guarantee upon the said Beattyville bonds they in March, 1890, adopted resolutions at a regular stockholder's meeting repudiating the action of the directors and directed legal proceedings to be at once instituted to obtain a cancellation of all such unauthorized guarantees.

In April ,1890, suit was brought by such defendant corporation in the Circuit Court of the United States for the District of Kentucky against divers parties to have such bond guarantees declared to be void, and such court, in 1894, rendered a final decree sustaining such contention and adjudged that such guarantees were illegal and void and ordered the same to be cancelled and forever enjoined the holders thereof who were parties to such suit from instituting any suit against the defendant corporation herein upon or by reason of such guaranty.

From such decree of cancellation the holders of such guaran-
7 teed bonds as were parties prosecuted an appeal to the United
States Circuit Court of Appeals for the Sixth Circuit, and the latter court has recently reversed such decree of cancellation and ruled and decided that the defendant corporation is liable on such guaranty to all persons who obtained such bonds for value and without notice that the majority of its stockholders had not peti-

tioned for or authorized the guaranty. Such court of appeals further held and decided that upon the evidence all of the bonds covered by the decree except a small number were acquired in good faith and without such notice and and that the defendant corporation was therefore liable upon such guarantee.

As complainant is advised persons and corporations holding over $500,000 of such guaranteed bonds who were not citizens of Kentucky or within the jurisdiction of said United States Circuit Court for the District of Kentucky, and who were not parties to the suit in such court do now claim and assert that by reason of such decision and reversal by the United States Circuit Court of Appeals the defendant's guarantees upon the Beattyville bonds in their hands have been adjudged valid and enforcible for the full principal and interest thereof.

9. Complainant is advised by the officers of the defendant corporation that the total amount of claims now asserted against it by reason of such bond guarantees will probably exceed $1,200,000. That the holders are numerous, scattered and some of them unknown. That already suits in attachments have been instituted
against it in the State Courts of Kentucky by some of the holders
8 of such guaranteed bonds and the earnings and traffic balances
of the defendant's railroad have been seized in garnishment and
that such creditors and others in like situation threaten to institute other legal proceedings in Kentucky and Illinois and levy upon, seize and attach not only the current earnings of the railroad, but also the engines, cars and trains thereof when found in such last named States, and complainant verily believes that many such attachment suits will be presently instituted and seizure of equipment made by divers persons holding such guaranteed bonds.

10. Complainant further shows that the defendant has no property except its railroad, equipment, and appurtenances and the corporate stock heretofore specified, and that all such property is described in and covered by one or more of the five mortgages hereinbefore set out and that it has no resources to pay its unsecured debt except such surplus income from its road operations as may remain after discharging the interest upon mortgage bonds.

The corporate officers report that the current earnings of the road in consequence of a short wheat crop and lessened traffic are about $60,000 a month less than for the corresponding period of last year, and that such decline in earnings is likely to continue for

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some months and that it will be impracticable to realize from such earnings after payment of operating expenses, taxes and rentals a sum sufficient to pay the next shortly maturing coupons upon the $3,800,000 general and equipment mortgage bonds and that both such liens will be defaulted upon at the next interest day.

The decision rendered within the last month holding the de-
9 fendant liable for over a million dollars by reason of such bond
guarantees, has in this period of exceptional shrinkage in traffic absolutely destroyed the credit of the defendant corporation so that it cannot either pay or renew its bank obligations or fund the same and the said corporation is in fact insolvent.

11. Complainant charges that the owned and operated lines of railroad of the said defendant corporation lie in three different States and are subject to the jurisdiction of the courts in each of the counties in the said three states in which any part of the property is situated; that it owns a large amount of rolling stock materials and supplies necessary for the operation of the line, and that the unity of the property and its integrity as a whole as now held and operated as a railway line connecting important cities in the three different states and engaged in domestic and interstate commerce constitutes an important element of its value, and that to permit its severance or the continuous disturbance of its operations will result in ruinous sacrifice to every creditor of said corporation and disable it from performing its duties as a public carrier. That the complainant verily believes that unless this court in view of the present condition of the affairs of said insolvent corporation and the divers threatened litigations, attachments and seizures and the impending and inevitable default soon to occur on the two mortgage liens aforesaid, will deal with the property as a single trust fund and take it into its judicial custody for the protection of every interest therein that divers individual creditors of the defendant
will proceed to assert their remedies in the different courts in
10 the several states where the property is situated, that levys
and attachments will be laid upon the engines and cars of the company and the fuel, material and supplies which are indispensable to the continuous operation of the railroad will be seized, which will greatly interfere with and ultimately prevent the company from a proper discharge of its duties as a carrier and seriously diminish the earnings of the road; that considerable and unnecessary multiplicity of suits will result; that judgments and priorities will be attempted and the trust property, valuable mainly in consequence of its unity, will be dismembered by the con-

flicting decrees and judgments of the many courts exercising such separate jurisdictions at the suit of individual creditors.

Inasmuch, therefore, as the complainant has no adequate remedy at law for the greivances hereinbefore stated and can only have relief in equity, he files this bill of complaint in behalf of himself and all, others in like relation to the said property, and prays that due process of law issue against the defendant, the Louisville, New Albany & Chicago Railway Company, and that it be summoned to appear in this court and answer this bill, but without oath, all answers under oath being hereby expressly waived under the rules to stand to and abide by such orders and decrees as the judges of this court may from time to time enter in the premises; that for the purpose of enforcing the rights of complainant and all other creditors of said insolvent corporation according to their due equities and priorities and to preserve the unity of the said railway system as it has been and now is maintained and operated and to prevent the disruption thereof by the separate 11 attachments, executions or levys, this court will forthwith appoint a receiver for the entire railroad, property, choses in action and assets of every description wherever situated belonging to the said defendant corporation with authority to manage and operate the same as the officer of and under the protection of this court with the usual powers of a receiver in such cases, and that all of the officers, managers, superintendents and employees of the said railway company shall be ordered and required forthwith to deliver up possession of all and singular every part of the said property of said insolvent corporation over which the said receiver is thus appointed, and shall also deliver over all books of account, offices, vouchers and papers in any way relating to the present business or operation of said system of railway and shall be restrained form interfering in any way whatever with the possession and control of the receiver over any part of the said property so to be delivered to him. That the court will fully administer the trust fund in which the complainant is interested as a judgment creditor and will for such purpose marshall all the assets of said insolvent corporation and ascertain the several liens and priorities existing upon the said system of railways or any part thereof and the amount due upon each and every of such liens whether by mortgage or otherwise, and enforce and decree the rights, liens and equities of each and all of the creditors of the said Louisville, New Albany & Chicago Railway Company as the same may be finally ascertained and decreed by the court upon the respective claims and interventions of several of such creditors or lienors in

Bill of Com-plaint of J T. Mills, J

and to not only the said line of railroad, appurtenances and 12 equipment or any part of them, but also to and upon each and every portion of the assets and property of the said insolvent corporation, and that said railroad and all the assets of such corporation shall be sold by proper decree of the court, and the proceeds divided among the different creditors according as their liens and priorities may be decreed by the court, and for such other and further relief as to the court may seem proper and as may be necessary to further enforce the rights and equities of the complainant and all other creditors of such corporation.

JOHN T. MILLS, JR.
Complainant.

HENRY CRAWFORD,
WILLIAM R. CRAWFORD,
Solicitors.

UNITED STATES OF AMERICA, }
DISTRICT OF INDIANA. } ss.

Henry Crawford on oath says he is solicitor and agent of the complainant, John T. Mills, Jr., of New York, who is now absent from this district.

Affiant has read the above bill of complaint and states that the matters therein set forth are true as he verily believes.

HENRY CRAWFORD,

Subscribed and sworn to before me, this August 24th, 1896.

NOBLE C. BUTLER.
Clerk.

And at the same time, on said 24th day of August, 1896, 13 before the Honorable William A. Woods, Judge of said court, the following further proceedings in the above entitled cause were had to-wit:

tment of
McDoel
r.

Now on this August 24th, 1896, comes the complainant by Henry Crawford, his solicitor, and presents to the court his verified bill of complaint as judgment creditor of said railway company. and alleging its insolvency and praying for the appointment of a receiver of all the assets of such corporation and the general administration and liquidation of its affairs:

Comes also the defendant railway company by E. C. Field, its general solicitor, and enters its appearance to this action and files its answer admitting the material allegations of said bill to be true, and the complainant's motion for a receiver coming on to be heard, upon consideration of the matters set up in the said bill and admitted by the answer, the defendant appearing to such application for the sequestration of its property and interposing no objection thereto, it is ordered, and adjudged by the court that William H. McDoel, of Chicago, Illinois, be and he is hereby appointed receiver of all and singular the railroads, property, choses in action, moneys, books, papers, records and all other assets of such corporation wherever situate, as described in the Bill of Complaint herein, being the lines of railroad extending from Louisville, in the State of Kentucky, to Michigan City in the State of Indiana, and also the line extending from the city of Indianapolis to the city of Chicago. Illinois, and also the railroad extending from Bedford,
14 Indiana to Switz City in such State, and also the railroad extending from Orleans, Indiana, to French Lick, in such State, together with all the engines, cars, equipment, appurtenances, fuel, material, tools, and office furniture, and supplies, whereever situate, which belong to such corporation, including all leasehold estates or interests, trackage and traffic rights, and contracts with other roads, bridges or corporations, all its tracks, siding, terminal facilities, shops, offices, stations, tanks, rights of way, buildings of every kind, and any and all other property of every and any kind owned, held, leased or enjoyed by said defendant railway company at the date of the filing of this bill in connection with the operation of its system of railways in the States of Indiana, Illinois and Kentucky, and also all the moneys, choses in action, credits, uncollected earnings, bonds, stocks, contracts and rights thereunder, books, records, vouchers, papers and all other assets of every kind, real, personal or mixed, held or possessed by said defendant railway company.

The said receiver is hereby fully authorized and directed to

Appointm W. H. Mc Receiver.

forthwith demand and take the immediate and exclusive possession of all and singular the within described system of railway, branches, leasehold interests, equipment, appurtenances, money, choses in action, and all other corporate assets wherever situate and where-ever found and as the officer of this court to continue to operate the said system of railway in the same manner as at present conducted and in all respects perform and fully discharge the duties owed by the said railway company as a public carrier of passengers and freights, and receive, hold and disburse all the income, earnings derived from the operation of such railroad in such manner as 15 shall be directed by this court.

Each and every of the directors, officers, agents and employees of the said Louisville, New Albany & Chicago Railway Company, are hereby ordered, directed and required forthwith upon the demand of the said receiver or his duly authorized agent to at once turn over and deliver to such receiver or such agent as he may authorize any and all the railroad, equipment, appurtenances, leaseholds, materials, supplies, moneys, choses in action, bonds, stocks and all other property, real, personal or mixed belonging to such defendant railway company, or in which it has any interest or possession, and also all books of account, vouchers, papers, contracts, deeds, records, bills, notes, accounts, or other property in their hands or under their control. And each and every of such directors, officers, agents and employees, are hereby enjoined and restrained from interfering in any way whatever with the possession, control or operation of such railroad company, corporate property, and assets or any part thereof, except as directed and authorized by the said receiver.

The said railway company, by its proper officers, and under its corporate seal is required forthwith to execute and deliver a proper assignment in writing vesting in such receiver all and singular the personal property, choses in action and earnings belonging to such company at the date of filing this bill.

The said receiver is hereby fully authorized to operate and manage the said railroad and all other corporate assets at his 16 discretion and in such manner as will fully discharge its public duties and produce the best financial results, and for such purpose he is vested with full discretionary power subject to the approval of the court to employ and discharge and fix the duties and compensation of all such officers, attorneys, agents, and employees, as may in his judgment be necessary or proper to enable him to satisfactorily conduct the operations of such railroad.

tment of
McDoel
er.

The said receiver is hereby fully authorized and empowered to institute all such suits as may in his judgment be necessary to collect the outstanding choses in action or assets of such railway company or to properly enforce and protect the property and trusts hereby vested in him.

He is further fully authorized to defend any and all actions instituted against him as such receiver and to also appear in and conduct the prosecution of all such suits brought by or against the said railway company, the prosecution or defense of which may be in the judgment of such receiver, necessary for the protection of the property or the interests and rights of creditors.

The said receiver is hereby fully authorized in his own name to demand, sue for, receive and receipt for all the uncollected earnings, traffic balances, accounts, notes, and choses in action of every kind belonging to such railway company at the date of filing this bill, all which are vested in such receiver. And he is also authorized to receive all the income and earnings to be derived from the operation of said railway after he takes possession under the order of this court.

17 Out of the funds from time to time coming into his hands, from the operation of said railroad, the said receiver shall pay the necessary current expenses of operating the said road, and executing the trusts hereby vested in him, including all taxes and assessments upon the said property, and shall also pay and discharge all unpaid payrolls and vouchers and claims for operating supplies, car mileage and traffic balances, which have accrued in the operation of the railroad at any time within six months prior to the entry of this order.

The receiver is hereby required to open proper books of account wherein shall be stated the earnings, expenses, receipts and disbursements of his trust, and he shall take and preserve vouchers for all payments made and file in this court monthly reports of his receipts and disbursements.

The said receiver is ordered within ten days to file with the clerk of this court a proper bond in the penal sum of one hundred thousand dollars, with surety to be approved by the court, conditioned for the proper discharge of his duties as such receiver, and to account and pay over all funds coming into his hands according to the orders of this court.

The said receiver or any party in interest has liberty to apply to the court at any time for such modification of this order as they may be advised.

Appointm
W. H. Mc
Receiver.

And afterwards, to-wit: at the May term of said court, on the 27th day of August, 1896, before the Honorable William A. Woods, Judge of said court, the following further proceedings in the above entitled cause were had, to-wit:

The court now of its own motion, by way of supplement to
18 the order of the appointment of the receiver herein, orders that as soon as practicable and within twenty days, the receiver file with the clerk of this court a statement of the liabilities of the Louisville, New Albany & Chicago Railway Company and of the assets of the company available for the payment of liabilities, showing what obligations are secured by mortgage or otherwise, what are entitled to equitable preference, and what are unsecured, the rate of interest on secured liabilities, when payable, whether default has been made in the payment of interest and whether after paying operating expenses, the interest can be paid on mortgage bonded indebtedness as it matures so as to prevent default, and if there is likely to be a deficiency of means, after paying operating expenses, to paying accruing interest on bonded debts, what as near as can be estimated, will be the amount of the deficiency, or, if a surplus is probable, of what amount.

And afterwards, to-wit: at the May term of said court, on the 1st day of September, 1896, before the Honorable William A. Woods, Judge of said court, the following further proceedings in the above entitled cause were had, to-wit:

Comes now William H. McDoel, and files his bond as receiver herein in the sum of one hundred thousand dollars, with Samuel Thomas, Gilbert B. Shaw and James Murdock as sureties thereon, which bond is approved by the court.

And afterwards, to-wit: at the May term of said court, on the 12th day of September, 1896, before the Honorable William A. Woods, Judge of said court, the following further proceedings in the above entitled cause were had, to-wit:

n for au-
to pay
f Ohio
Car Co.

Now on this 12th day of September, 1896, comes William
19 H. McDoel, receiver in the above entitled cause, by E. C.
Field, his attorney, and presents his petition asking for authority to pay a certain note therein described out of the earnings, said petition is in the words following, to-wit:

Your petitioner, William H. McDoel, Receiver, appointed in the above entitled cause, comes and respectfully shows that on the 23rd day of April, 1896, the Louisville, New Albany & Chicago Railway Company entered into a contract with the Ohio Falls Car Manufacturing Company, for the purchase of one mail car, railroad number 83, owners plate number 26, for which said railway company executed its promissory note of said date, in the sum of $6,249.34, which becomes due and payable according to the terms thereof on the 23rd day of September, 1896, without grace; that said car was worth the amount of money agreed to be paid therefor and is valuable and necessary in the operation and conduct of the business of carrying the United States mails and will be to the advantage of the trust confided to this petitioner to retain the title and possession thereof; that by the terms of the agreement between said parties that in case of default in the payment thereof the said car company or its assigns shall have the right at its or their option to take immediate and exclusive possession of and remove said car, and is also vested with author-
20 ity to sell the same on notice at public or private sale and to
apply the proceeds to the payment of said note, and in case of any deficit the railway company is made liable for the payment thereof on demand.

Wherefore, petitioner prays authority and direction of this Honorable Court to pay out of the earnings the said note according to the terms.

WM. H. MCDOEL.
Receiver.

E. C. FIELD.
Attorney for Receiver.

STATE OF ILLINOIS, }
COUNTY OF COOK. } SS.

William H. McDoel, being first duly sworn, deposes and says that he is the receiver mentioned in the foregoing petition; that he has read the foregoing petition and that the statements therein are true and correct, as he verily believes.

Petition for
thority to pa
note of Ohi
Falls Car C

Wm. H. McDoel.

Subscribed and sworn to before me, a notary public in and for said State and county, on this 11th day of September, 1896.

[SEAL]

Wm. S. Kinman.
Notary Public.

And the court being advised in the premises:

21 It is ordered, adjudged and decreed that the receiver herein be authorized to pay out of the earnings the principal and interest of said note according to the terms thereof.

Order on s

And afterwards, to-wit: at the May Term of said court on the 23rd day of September, 1896, before the Honorable John H. Baker, one of the Judges of said court, the following further proceedings in the above entitled cause were had, to-wit:

Comes now William H. McDoel, Receiver herein and files his application for the allowance of certain claims for overcharges, &c., in the words following, to-wit:

Application of Receiver for leave in his discretion to allow and pay certain claims.

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William H. McDoel, receiver appointed in the above entitled cause, respectfully represents to the court that prior to his appointment there were pending a large number of claims in behalf of shippers and connecting lines of railroad, growing out of overcharges, losses and damages in freight shipments; that is to say, where a car load of freight originated on the line of the receiver's road destined to a point beyond said line and over the line of another road and either an overcharge on such freight, loss thereof or damage thereto occurred, the same would be directly charged to the road on which said freight originated, but if all or any part of such claim were properly chargeable to the contracting line, the road receiving such freight would pay such claim and charge it up in the

account with the connecting line against such other road, and the same would be the course of business and procedure with freight originating on the connecting line. In this way accounts
22 growing out of such claims would be carried by the respective
roads for a long period of time; that such was the manner of doing business between your petitioner's road and connecting roads, for a long time prior to his appointment, covering in some instances a period of several years prior thereto; that the same manner of doing business was also true respecting shippers on your receiver's line of railroad and connecting lines, and that there is a large number of claims which were vouchered prior to the appointment of said receiver, and there is a number which should be vouchered, the most of which were approved within a year prior to the appointment of the receiver, and a few extending back for a period of two years; that the aggregate amount of said claims growing out of the overcharge, loss and damage, will not exceed approximately the sum of forty thousand dollars, and your receiver prays the court that he may be ordered to settle said accounts in his discretion, where the same are shown to be valid and just.

Said receiver further represents that in respect to the claims of connecting lines of railroad there has been a running account of charges made, one against the other, growing out of said business; for instance, one connecting road may have charged against your petitioner's road one thousand dollars on account of overcharge, loss and damage to freight, while your receiver's road may have a like amount charged on the same account against such connecting road; and it is important to successful railroad management that said claims should be adjusted and if anything is found due a connecting road that the amount thereof should be paid and if any amount is found due from the connecting road to your Re-
23 ceiver's road that the same should be collected; and your
petitioner represents in respect to individual shippers that their claims growing out of overcharges, losses and damages were promptly filed for adjustment, and the delay in the allowance and payment of the same arose through no fault of said claimants, but the delay thereof was occasioned by the necessary investigation required to determine the validity and justness of said claims, and your petitioner represents that where said claims are found to be just that the same should be paid irrespective of whether the same arose within six months prior to the date of your receiver's appointment and that the settlement and payment thereof is to the interest of the business entrusted to said receiver, and that their payment is necessary to restrain and hold the patronage of the shippers of

said road; that if said claims which are determined to be just are not allowed and paid, great loss will be entailed in respect to the business of said company as conducted by your receiver.

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Wherefore, said receiver prays this Honorable Court to direct order and vest him with discretionary power to settle and pay said claims of the character herein recited irrespective of the date of the same, and that said receiver be directed to pay the same, out of the funds in his possession or which may come into his possession out of the earnings of the road.

Wm. H. McDoel,
Receiver.

United States of America,
State of Indiana, } ss.
Marion County.

William H. McDoel being by me first duly sworn on oath says,
24 that he has read the foregoing application and is cognizent of the facts therein stated and that said facts are true as he verily believes.

Wm. H. McDoel.

Subscribed and sworn to before me this 23rd day of September, 1896.

Noble C. Butler,
Clerk.

And at the same time, on the 23 day of September, 1896, before the Honorable John H. Baker Judge of said court, the following further proceedings in the above entitled cause were had to-wit:

Order up

And now upon this 23 day of September, 1896, there was presented to me the application of William H. McDoel, receiver for the allowance and payment of certain claims on behalf of shippers and connecting railroads, for over charges, losses and damages in the shipment of freight prior to the appointment of the receiver in the above entitled cause; and it appearing to me that the said application is just and reasonable and that such claims as are found to be valid and just should be paid for the reason that it would be to the best interest of the property of the defendant and to the management of said property in the hands of the receiver.

pon same.

It is therefore considered, ordered and adjudged that the prayer of the said application be granted and that all claims for overcharges, losses and damages in the shipment of freight on behalf of shippers and connecting lines of railroad, irrespective of the time or date when the same may have accrued prior to the appointment of the receiver in the above case be properly audited and
vouchered by the proper accounting officers of the receiver
25 and when so audited shall be approved and paid by said re-
ceiver if in his judgment the same are just and valid claims for payment.

And afterwards, to-wit: at the May term of said court, on the 23 day of September, 1896, before the Honorable John H. Baker, one of the judges of said court, the following further proceedings in the above entitled cause were had, to-wit:

Comes now the receiver and files his petition in the words following, to-wit:

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Application of receiver for order to pay certain claims growing out of contracts for construction of Stone quarry tracks, etc.

William H. McDoel, Receiver appointed in the above entitled cause, represents to the court that along the line of said railroad there are a large number of stone quarries, grain elevators and other business enterprises, which now and for a long time past have offered a large volume of freight business to said above entitled defendant; that said stone quarries are approximately one mile distant from the main line of said railroad; that in order to afford facilities for the transportation of stone from said quarries it became necessary for said defendant to build tracks from its main line into said quarries; that in all cases written contracts were entered into between the owners of the quarries and the railroad company, by the terms of which the owners of the quarries obtained the title to the right of way and graded and bridged the
road bed, ready for the ties and iron, and either vested the
26 title to the right of way directly in the railway company or
agreed to convey the same upon the performance of the conditions therein named; that the owners of said quarries advanced the necessary amount of money for the ties and iron, material and labor for laying the track, to the railway company, with an agreement on the part of the railway company, with an agreement on

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the part of the railway company to pay the said money back to said quarry owners by a rebate of from one to two dollars per carload of stone shipped from said quarries over the line of said railway company; that the same kind of contracts were made with the owners of elevators and other industries along said line, from which said railway company received large amounts of freight, but in nearly all cases the distance from the main line to such elevators and other enterprises was not to exceed 500 feet; that there is due and to become due and payable to parties of the above named classes approximately eighteen thousand dollars; that their business is important and profitable to the defendant and to all interested in said property, and your petitioner represents that their claims are in the nature of an equitable lien upon the property of said defendant company for the amount owing them under the terms of said contracts, and that he believes it is in the interest of the trust that said claims should be paid out of the earnings of the road;

Wherefore your petitioner prays that the court order and direct the payment of said claims irrespective of whether or not the same accrued within six months prior to the date of his appointment as receiver.

Wm. H. McDoel,
Receiver.

Order on sa

27 And it appearing to the court that the matters stated set forth in said petition are true and that there is due the owners of stone quarries, elevators and other industries on the line of the railway of defendant for rights of way and construction of tracks from the main line to them, under contracts between the owners thereof and the defendant, the sum of eighteen thousand dollars, more or less, which is payable in the way of rebates of one to two dollars per carload of freight shipped by said owners thereof over the railway of said defendant and that it is for the interest of the trust that the claims under and on account of said contracts should be paid in accordance with the terms thereof. It is thereupon owned by the court that the receiver allow and pay such claims and rebates as aforesaid out of the earnings of his receivership.

And afterwards, to-wit: at the November term of said court, on the 12th day of November, 1896, before the Honorable William A. Woods, Judge of said court, the following further proceedings in cause No. 9,400 were had, to-wit:

Come now the complainants, by Butler, Notman, Joline & Mynderse, their solicitors, and file their bill of complaint herein, in the words following, to-wit:

28 COPY.

CIRCUIT COURT OF THE UNITED STATES, DISTRICT OF INDIANA.

Central Trust Company of New York
and John H. Stotsenburg,
Complainants,
9,400. Versus
Louisville, New Albany & Chicago Railway Company and others,
Defendants.

BILL OF COMPLAINT.

To the Honorable the Judges of the Circuit Court of the United States for the District of Indiana, Sitting in Equity:

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Central Trust Company of New York, a corporation created and existing under the laws of the State of New York, and a resident and citizen of the State of New York, and John H. Stotsenburg, a resident and citizen of the State of Indiana, bring this their bill of complaint against the Louisville, New Albany & Chicago Railway Company, a corporation created and existing under the laws of the State of Indiana, and a resident and citizen of the State of Indiana, and an inhabitant of the District of Indiana, and against James Murdock, a citizen of the State of Indiana, residing in Lafayette in said State of Indiana and against the Farmers' Loan and Trust Company, a corporation created and existing under the laws of the State of New York, and a resident and citizen of the State of New York, and against John H. Barker, a citizen of the State of Indiana, residing in Michigan City, in said State of Indiana, and thereupon your orators complain and say:

29 I. On and prior to the first day of May, 1890, the Louisville, New Albany & Chicago Railway Company (hereinafter styled the New Albany Company) was and it is still a corporation duly created and existing under the laws of the State of Indiana, and was and is fully authorized to construct, equip, own, maintain and operate the lines of railway hereinafter mentioned, and to execute and deliver the bonds and mortgages hereinafter mentioned. The defendant James Murdock is a citizen of the State of Indiana, and resides in Lafayette, in said State of Indiana, and the defendant the Farmers' Loan and Trust Company is a corporation duly created, organized and existing under the laws of the State of New York, and a resident and citizen of said State of New York, and the defendant John H. Barker is a citizen of the State of Indiana, and resides in Michigan City, in said State of Indiana.

II. Your orator Central Trust Company of New York was at the times hereinafter mentioned, and now is, a corporation created and existing under the laws of the State of New York, and bearing the corporate name of the Central Trust Company of New York, and at all the times hereinafter mentioned it was and now is duly authorized and empowered under the terms of its charter to take and hold in trust the property transferred and conveyed to it in trust as hereinafter stated, and to execute and perform the trusts imposed upon it under and by virtue of the mortgages or deeds of trust hereinafter described. Your orator John H. Stotsenburg
30 is a citizen of the State of Indiana, and resides in New Albany, in said State of Indiana.

III. On or about the 1st day of July, 1880, the defendant New Albany Company made its certain mortgage, bearing date on that day, to John C. New, of Indianapolis, and Washington C. DePauw, of New Albany, in the State of Indiana, as trustees, to secure $3,000,000 of bonds bearing date July 1st, 1880, and payable July 1, 1910, with interest at the rate of six per cent. per annum, such bonds being called Main Line bonds, and said mortgage being a lien upon the main line from New Albany to Michigan City. On or about the 10th day of August, 1881, said New Albany Company made its certain mortgage to John C. New, of Indianapolis, as trustee, to secure $2,300,000 of bonds bearing date August 10, 1881, and payable August 1, 1911, with interest at the rate of six per cent. per annum, such bonds being called Air Line bonds, and said mortgage being a lien upon the Air Line from Indianapolis to the State line of Illinois. On or about the first day of January, 1886, said New Albany Company made its certain mortgage, bear-

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ing date on that day, to the Farmers' Loan and Trust Company, of New York, and John H. Barker, of Michigan City, as trustees, to secure an issue of bonds bearing date January 1, 1886, and payable April 1, 1916, with interest at the rate of six per cent. per annum, such bonds being called Consolidated bonds, and some thereof being now outstanding, and said mortgage covering the system of railroad of said New Albany Company.

IV. On or about the first day of May, 1890, the New Albany 31 Company, for the purpose of paying, funding, exchanging and retiring its mortgage bonds then outstanding, and for constructing and acquiring extensions and additional lines of railroad, and for increasing the equipment, shops, buildings, sidings, appurtenances and facilities, and improving the condition of its railroad, in the lawful exercise of its corporate powers, and due corporate action having first been had, resolved and determined to issue its series of bonds, to be designated General Mortgage Gold Bonds, bearing interest at the rate of five per cent. per annum, and payable in fifty years from May 1, 1890, to the amount of $25,000 per mile of main track of its then existing system and of additional railroad actually owned by it, either in the State of Indiana or elsewhere, and to secure the payment of said bonds by a mortgage or deed of trust conveying all the railroad of the company then constructed and in operation, including all its branches, sidings, and leasehold rights, and also all railroads, extensions and branches which might be thereafter created, built, purchased or acquired by said company, whether by construction, purchase, consolidation or otherwise, and whether situate within or without the State of Indiana, together with all the equipment and appurtenances at any time belonging to said company, or in use on its lines of railway, wherever situate, and all and singular its property of every kind and nature, real, personal and mixed, then owned or at any time to be there- 32 after acquired, in possession or expectancy, including the corporate and other franchises of the company. In pursuance of said resolution and determination, and in the exercise of its lawful corporate powers, said New Albany Company did thereafter make and execute 2,800 bonds of said series, amounting to $2,800,000 of principal par value, by each of which bonds said New Albany Company, for value received, agreed to pay to the Central Trust Company of New York, or the bearer thereof, the sum of $1,000 in gold coin of the United States of the present standard of weight and fineness, at the office or agency of said New Albany Company in the City of New York, on the 1st day of May, in the year 1940, with interest thereon in the meantime at the rate of five per cent.

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per annum, payable semi-annually in like gold coin on the 1st days of May and November in each year at the said New York office or agency, upon presentation of the coupons thereto annexed as they severally should become due.

V. On or about said 1st day of May, 1890, said New Albany Company, in pursuance of the resolution and determination above mentioned, and in the due exercise of its corporate powers, and due corporate action having first been had, in order to secure the payment of the principal and interest of the said bonds as the same should respectively become due and payable, according to the tenor and effect of the said bonds and the coupons or interest warrants accompanying the same, made, executed and delivered unto your orators a certain mortgage or deed of trust bearing date on the
33 said 1st day of May, 1890, and therein and thereby granted, bargained, sold, assigned, set over, released, conveyed and confirmed unto your orators, and to the survivor of them, and to their successor or successors in the trust therein and thereby created and declared, certain railroads and property described in said mortgage as follows, (the words "party of the first part" and "railway company" in said description being used to designate the New Albany Company):

"All the present and in future to be acquired railway system and property of the said party of the first part, of every kind and nature, and however owned, held, leased or enjoyed, together with all the equipment, appurtenances and franchises now owned or at any time hereafter to be acquired by it, being more particularly described as follows: All the present line of railway extending from New Albany, Indiana, to Michigan City, in the same State, and also from Indianapolis, Indiana, to a point on the State line between Indiana and Illinois, about twenty miles southeast of the City of Chicago, Illinois, and also its proprietary and owned line of railroad, called the Bedford and Bloomfield Railroad, extending from Bedford to Switz City, in Indiana, and also its other proprietary and owned line of railroad, called the Orleans, West Baden and French Lick Springs Railroad, extending from Orleans to French Lick, Indiana, and also all its lands, station buildings, tracks and terminal facilities in the City of Louisville, Kentucky, and also all its rights, interest, proprietary and leasehold es-
34 tate and terminal facilities in the franchises, property, tracks and station buildings of the Chicago & Western Indiana Railroad Company, and in the Belt Railway Company of Chicago, in the City of Chicago, or elsewhere in the State of Illinois; and also

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all its real estate, trackage, leasehold and contract rights and terminal properties, stations, sidings and franchises in the City of Indianapolis, Indiana, and also all its leasehold and contract rights, trackage and terminal facilities vested in the party of the first part by virtue of its certain written contracts with the Jeffersonville, Madison & Indianapolis Railroad Company, the Pennsylvania Company, and the Louisville Bridge Company, whereby the trains and traffic of the said party of the first part are moved and handled between the City of New Albany, Indiana, and the City of Louisville, Kentucky, the before mentioned system of railroads owned by the said party of the first part and exclusive of tracks leased and operated by it, being about five hundred and twelve miles in length, and situate in the Counties of Floyd, Clark, Washington, Orange, Lawrence, Greene, Monroe, Owen, Putnam, Montgomery, Tippecanoe, White, Pulaski, Starke, LaPorte, Marion, Hamilton, Boone, Clinton, Carroll, Jasper, Newton and Lake, in the State of Indiana, and Cook County, in the State of Illinois, and Jefferson County, in the State of Kentucky; and also all other railroads, extensions and branch lines which the railway company, party of the first part, may at any time hereafter create, own or acquire, whether by construction, purchase, consolidation or otherwise, whether within the State of Indiana, or in any other State, including and conveying by these presents all the property of every sort or nature, real, personal and mixed, now owned by said railway company and all that it may in the future add, construct, or acquire, for the purposes of and connected with or appertaining to the railroads or railways above mentioned and described, whether now owned or hereafter to be constructed or acquired, together with all the lands, tracks, lines, rails, bridges, ways, buildings, shops, tanks, piers, wharves, structures, erections, turntables, fences, walls, fixtures, franchises, privileges and rights of the railway company, and also all locomotives, engines, tenders, cars, carriages, tools, machinery, manufactured and unmanufactured materials, coal, wood and supplies of every kind belonging or appertaining to the railway company; also all the tools, incomes, issues and profits arising out of the said property and its operation, and all rights to receive and recover the same, also all estate, right, title and interest of the party of the first part in and to any and all real estate belonging to said party of the first part; also all leasehold lands, with the buildings thereon erected, it being the true intent and meaning of these presents that the said railway company, party of the first part, shall and doth convey to the said trustees all and all manner of franchises of every kind and description, however derived and wherever situate, all and all manner of

real estate or interest therein, wherever such real estate may
36 be situate, and all and all manner of personal property, of
whatever nature or description the same may be, at the date of these presents owned or possessed by the said railway company, or which may, at any time hereafter, during the continuance of this trust, be acquired by the said railway company for purposes connected with or appertaining to the railroads or railways above mentioned or described, or intended to be hereby conveyed, whether now in existence or at any time hereafter to be constructed or acquired, whether within or without the State of Indiana; and also all choses in action of every kind and description, including bills receivable, book accounts, traffic balances, all books of record and all accounts of every kind and description, all papers, maps, inventories and documents in any wise referring or relating to the property or franchises hereby conveyed; and also all franchises and property and all personal rights or interest in any franchises or property of every kind and description, real, personal or mixed, and wherever the same may be situate, that may, at any time, before or after the date of this indenture, be acquired by or for the said railway company, for purposes connected with or appertaining to said railroads or railways, either now owned or hereafter to be acquired, all of which it is hereby covenanted shall enure, by way of accretion, to the benefit and advantage of said trustees and by way of further and better security for the bonds to be issued hereunder: it being intended and hereby expressly cov-
enanted that the lien of this indenture shall embrace and bind
37 all railroads, real and personal property, choses in action,
contract rights and franchises which the said railway company now owns, or at any time hereafter may own, as fully and to the same extent as if all such property were now in existence and owned by the said railway company, and were specifically described herein and conveyed hereby."

To have and to hold all and singular the above described premises to your orators, their and each of their successor or successors in the trust thereby created, to the only proper use and behoof of your orators, their and each of their successor or successors, in trust for the security of the bonds and coupons to be issued under said mortgage or deed of trust, and for the uses and purposes therein expressed.

VI. The said mortgage or deed of trust was authorized, made, executed, and delivered in all respects in conformity with law, and was duly recorded in the office of the recorder of Floyd

County, Indiana, May 7, 1890, in Book 20 of Mortgages at page 1, and was also duly recorded in all the other counties wherein the mortgaged property or any part thereof was or is situated, and in all places wherein said mortgage was or is by law required to be recorded. Your orators duly accepted the trust created in and by said mortgage or deed of trust before the recording of the same as aforesaid. Your orators refer to the said mortgage so recorded and to a true copy thereof annexed to this bill of complaint
as a part thereof, marked "Exhibit A," for a particular statement
of the terms and provisions of said mortgage or deed of trust
38 and of the bonds issued thereunder, and your orators pray
that said copy of said mortgage or deed of trust marked "Exhibit A" may be taken in all respects as if it had been fully set forth in the body of this bill.

VII. The said bonds to the aggregate amount of $2,800,000 so made and executed as aforesaid were duly authenticated by the endorsement thereon of the certificate of the Central Trust Company of New York, one of your orators, as provided in said bonds and mortgage, and, so authenticated, were duly issued and delivered, and your orators are informed and believe that said bonds so issued and delivered have been duly issued, negotiated and sold to divers persons, who have thereby become bona fide holders thereof as purchasers of the same for value, and that all of said bonds are now outstanding, and valid and binding obligations of the New Albany Company. The holders of said bonds are numerous, and the names and residences of many of such holders are unknown to your orators.

In and by said mortgage or deed of trust it was expressly provided that $10,000,000 of the bonds authorized to be issued thereunder should be reserved to pay off, fund, exchange and retire the then outstanding bonds of said New Albany Company, to which reference has been made herein, but none of said bonds so reserved have been issued to take up, pay off or retire any of said outstanding bonds.

VIII. A part of the property covered by said mortgage consists of shares of the capital stock of sundry railroad companies
owned by said New Albany Company, and representing cer-
39 tain interests and property rights of said New Albany Com-
pany in and to certain lines of railroad. Said shares of stock have been delivered to and deposited with the Farmers' Loan and Trust Company, defendant herein, under and by virtue of a certain

agreement bearing date May 18, 1886, to which said New Albany Company and said Farmers' Loan and Trust Company and said John H. Barker are parties, and which is known as a collateral trust agreement, and under said agreement said shares of stock were deposited with said Farmers' Loan and Trust Company as further security for the bonds issued under and secured by the mortgage to said Farmers' Loan and Trust Company and said John H. Barker, as trustees, bearing date January 1, 1886, and hereinbefore mentioned. The shares of stock, which have been so delivered to, and are now held by said Farmers' Loan and Trust Company, are the following:

(1) Nine thousand nine hundred and ninety-nine shares of the capital stock of the Chicago and Western Indiana Railroad Company, of the par value of $100 each.

(2) Two thousand three hundred and ninety-nine shares of the capital stock of the Belt Railway Company of Chicago, of the par value of $100 each.

(3) Eleven thousand nine hundred and ninety shares of the capital stock of the Bedford and Bloomfield Company, of the par value of $50 each.

(4) Two thousand nine hundred and ninety shares of the Orleans, West Baden and French Lick Springs Railway Company, of the par value of $100 each.

Your orators allege that said shares of stock are a part of the property covered by said mortgage made by said New Albany Company to your orators, and form a part of the security given by and under said mortgage for the payment of said said bonds which have been issued thereunder, and that your orators have a lien upon said shares of capital stock as security for the payment of said bonds, subject only to the lien of said Farmers' Loan and Trust Company and said John H. Barker under and by virtue of said mortgage made and executed to said Farmers' Loan and Trust Company and said John H. Barker, as trustees, and under and by virtue of said collateral trust agreement, dated May 18, 1886.

IX. The said New Albany Company made default in payment on the 1st day of November, 1896, of the installment of interest due on that day on all of said bonds issued and outstanding as aforesaid, and secured by said mortgage to your orators as aforesaid, and said default still continues. Your orators are informed

and believe that demand was duly made on the said New Albany Company for the payment of the said installment of interest due upon said bonds November 1, 1896, as aforesaid, and that such demand was made on or about the day when said installment of interest became due as aforesaid, and that the coupons representing said installment of interest, or many thereof, were duly presented, and payment thereof duly demanded, but that payment of said installment of interest and of said coupons was refused, and that, neither on said 1st day of November, 1896, nor at any time since, did said New Albany Company have or provide at its office or
41 agency in the City of New York, or elsewhere, any funds
with which to pay said installment of interest or any part thereof, and your orators allege that no part of said installment of interest has been paid by said New Albany Company, or by any other person or corporation on its behalf, but that the whole of said installment of interest remains due, owing and unpaid.

X. Your orators further show that, on or about the 1st day of September, 1894, said New Albany Company made, executed and delivered to the Central Trust Company of New York (one of your orators) and to James Murdock, one of the defendants herein, as trustees, its certain other mortgage, securing bonds known as equipment five per cent. sinking fund mortgage gold bonds, and, in and by said mortgage, granted and conveyed unto said Central Trust Company and said Murdock, as trustees, the railways and property hereinbefore described, and also certain equipment and rolling-stock, which has been transferred to, and the title thereof vested in, said Central Trust Company of New York under and by virtue of the terms of said mortgage dated September 1, 1894, and has thus been subjected to the lien thereof. Said mortgage dated September 1, 1894, was made to secure an issue of bonds limited to $1,000,000, and your orators are informed and believe that all of said bonds have been authenticated by the endorsement thereon of the certificate of said Central Trust Company, and have been issued and delivered to said New Albany Company, and that 709 of said bonds, amounting to $709,000 of principal par value, have been
42 issued, negotiated and sold by said New Albany Company,
and are now outstanding in the hands of holders of the same for value. Your orators allege that the lien of said mortgage dated September 1, 1894, was and is subsequent and subordinate in all respects to the lien of said mortgage to your orators bearing date May 1, 1890, upon all the railroads and property described in or covered by sald mortgage dated May 1, 1890.

XI. In a certain cause now pending in the Circuit Court of

the United States for the District of Indiana, wherein John T. Mills, Jr., is complainant, and the Louisville, New Albany & Chicago Railway Company (one of the defendants herein) is defendant, such proceedings were had that on or about the 24th day of August, 1896, one William H. McDoel was appointed receiver of all the railroads and property of every description of the defendant New Albany Company, and thereupon said William H. McDoel, as such receiver, duly entered upon and took possession of all the railroads and property of the defendant New Albany Company, including all the property covered by and embraced in said mortgage to your orators. Thereafter, in a certain suit now pending in the Circuit Court of the United States for the Northern District of Illinois, between the same parties, a similar order was made and entered confirming such receivership of said William H. McDoel. Under and by virtue of the orders of said courts, said William H. McDoel now holds and has in his possession as receiver of this court all of the railroads and property of said New Albany Company, and this court, by virtue of such receivership, now has
43 all of said railroads and property in its possession and under its control.

XII. Your orators are informed and believe that the defendant New Albany Company is insolvent and wholly unable to pay its debts and obligations, and that the property and premises covered by the said mortgage so made to your orators as aforesaid, are of a value far less in amount than the amount of the bonds issued thereunder, and that said mortgaged property and premises are and constitute an inadequate security for the payment of the said bonds. Your orators further show that the financial affairs of the defendant New Albany Company are in an embarrassed condition, and your orators as trustees under said mortgage cannot execute or perform the trusts provided in and by said mortgage, or protect the rights of the holders of the bonds secured thereby, without the aid or interposition of this honorable court, sitting in equity, and without a judicial sale of all the mortgaged premises, franchises and appurtenances covered by the said mortgage or deed of trust, and that until such sale can be had and the proceeds thereof distributed it is expedient and necessary that all the said mortgaged property, of every nature and description whatsoever, shall be placed in the possession and under the control of a receiver or receivers, to be appointed by this honorable court, with such proper powers and control over the same as to this court shall seem just. Your orators are informed and believe that the said property covered by said mortgage constitutes and forms one railroad

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44 system, and that it is for the interest of all parties that it should be sold as an entirety, and that the value of it in portions and sections is and will be much less than its value as a whole, and that said mortgaged premises are so situated that the same cannot be sold in separate parcels without great and irreparable loss and sacrifice.

XIII. Your orators further allege that there is due and owing from said defendant New Albany Company to your orators, or the holders of said bonds, the sum of $70,000, with interest from November 1, 1896. Your orators are informed and believe that no proceedings have been had at law or in equity for the collection of the debt secured by said mortgage, or any part thereof, save only this suit.

Your orators, therefore, in view of the premises, seek the aid of this Honorable Court in equity, wherein only adequate relief can be administered in matters of this nature, and prays as follows:

1. That the said mortgage, dated May 1, 1890, may be foreclosed.

2. That the lien of the said mortgage may be decreed and established as a lien upon the railroads and other property covered thereby and hereinbefore mentioned and described, including the shares of capital stock hereinbefore particularly mentioned, and that the amount due and to become due for principal and interest upon the said bonds outstanding and secured by said mortgage may be ascertained and determined.

45 3. That in default of the payment of the sum so found due within a time to be limited by the decree of this Honorable Court it may be decreed that the defendants and all persons claiming under them, or either of them, any interest in said mortgaged property as aforesaid, subsequent to the lien of said mortgage, be absolutely barred and foreclosed of and from all right or equity of redemption of, in and to said mortgaged premises or any part thereof, and that a sale of the whole of the mortgaged property and premises be ordered in accordance with law and the practice of this Honorable Court, and that the proceeds may be applied to the expenses of this suit and to the payment of the amounts found due as aforesaid, and the balance thereof as the court may direct.

4. That a receiver or receivers be appointed to take possession of the railroad, property, estate and franchises of the defendant New Albany Company, and the earnings and proceeds thereof, with power to operate the said railroads and property, and with all such power and authority as may be requisite to preserve the same until the sale thereof, as the same may be declared and ordered by this Honorable Court, and to secure the earnings of the said railroads and property to the use of the bondholders, and with such other powers and authority as are usually possessed by receivers in like cases, as this court may direct.

5. That the defendants and each of them, their officers, directors, and all other persons claiming or pretending to claim under them, may be restrained by injunction of this Honorable
46 Court from interfering with or disposing of said mortgaged premises, property and franchises, or any part or parts thereof, or any earnings or proceeds thereof.

6. That the defendants herein may answer all and singular the premises, but not under oath, which is hereby expressly waived.

7. That your orators may have such other and further relief in the premises as the nature and circumstances of the case may require, and to your Honors seem meet.

May it please your Honors to grant unto your orators not only a writ of injunction, conformable to the prayer of this bill, to be issued to the said Louisville, New Albany & Chicago Railway Company, James Murdock, The Farmers' Loan and Trust Company and John H. Barker, but also a writ of subpœna, to be directed to the said Louisville, New Albany & Chicago Railway Company, James Murdock, The Farmers' Loan and Trust Company, and John H. Barker, commanding them and each of them at a certain time, and under a certain penalty, to be therein specified, to be and appear before this Honorable Court, then and there to answer the premises, and to abide by the order and decree of this court herein, and that said corporations may appear herein according to law.

CENTRAL TRUST COMPANY OF NEW YORK.
By....................
Vice-President.
JOHN H. STOTSENBURG.
By ....
His Solicitors.
BUTLER, NOTMAN, JOLINE & MYNDERSE.
47 Solicitors for Complainants,
54 Wall Street, New York.

of Com-
nt of Cent.
t Co. and
senburg.

STATE, CITY AND COUNTY OF NEW YORK
SOUTHERN DISTRICT OF NEW YORK. } SS.

E. Francis Hyde, being duly sworn, deposes and says that he is an officer, to-wit, the second vice-president of the Central Trust Company of New York, one of the complainants in this suit; that he has read the foregoing bill of complaint, and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true; that the seal affixed to the said bill of complaint is the corporate seal of said complainant, and was thereunto affixed by due and proper authority.

Sworn to before me this....day of November, 1896.

48

EHHIBIT A.

ibit to same

This Indenture, made and entered into this first day of May, one thousand eight hundred and ninety, by and between the Louisville, New Albany and Chicago Railway Company, hereinafter called the Railway Company, a corproation duly created and existing under the laws of the State of Indiana, party of the first part, and the Central Trust Company of New York, a corporation duly created and existing under the laws of the State of New York, hereafter called the Trust Company, and John H. Stotsenburg, of New Albany, in the State of Indiana, parties of the second part;

Whereas, the party of the first part owns and is operating a system of railroads in the State of Indiana, about 512 miles in length, which is composed of a line from New Albany on the Ohio River to Michigan City on Lake Michigan, hereafter called the Main Line; and a line from Indianapolis to a junction with 49 the Chicago and Western Indiana Railroad, at a point on the State line between Indiana and Illinois, about twenty miles southeast of Chicago hereinafter called the Air Line, together with certain proprietary and leasehold interests in the franchises and railroads of the said Chicago and Western Indiana Railroad Company, and the Belt Railway Company, of Chicago, and in the terminal facilities of the said companies in and near the City of Chicago, Illinois; and all its real estate, buildings, tracks, trackage and terminal rights, facilities and approaches in the other cities above mentioned and in the City of Louisville, in the State of Kentucky and between said City of Louisville, in the State of Kentucky and between said City of New Albany, and in the City of Indianapolis, Indiana; and is also the exclusive owner of the Bedford and Bloomfield, and the Orleans, West Baden and French Lick Springs Railroads.

Whereas, the said system of railroad is subject to the following present liens, that is to say:

First. The Main Line from New Albany to Michigan City is subject to the lien of a mortgage, made July 1st, 1880, by the party of the first part to John C. New, of Indianapolis, and Washington C. DePauw, of New Albany, in the State of Indiana, as trustees, to secure three million dollars ($3,000,000) of bonds, bearing date July 1st, 1880, and payable July 1st, 1910, with interest at the rate of six per cent. per annum, hereafter called Main Line Bonds.

Second. The Air Line from Indianapolis to the State line of Illinois is subject to the lien of a mortgage made August 10th, 1881, by the party of the first part of John C. New, of Indianapolis, as trustee, to secure two million three hundred thousand dollars ($2,300,000) of bonds, bearing date August 10th, 1881, and payable August 10th, 1911, with interest at the rate of six per cent. per annum, hereafter called Air Line Bonds.

Third. The whole system of railroad is subject to the lien of a mortgage made January 1st, 1886, by the party of the first part to the Farmers' Loan and Trust Company of New York, and John H. Barker, of Michigan City, as trustees, to secure now outstanding bonds amounting to four million seven hundred thousand dollars ($4,700,000), bearing date January 1st, 1886, and payable April 1st, 1916, with interest at the rate of six per cent. per annum, hereafter called Consolidated Bonds.

Fourth. The whole of the said mortgage liens amount in the aggregate to ten million dollars ($10,000,000).

Whereas, at a meeting of the stockholders of the said railway company, party of the first part, duly and legally called and held on March 22, A. D. 1890, a preamble and resolutions were adopted by the affirmative votes of 32,641 shares of stock in the said company, which read as follows:

ibit to same Whereas, it is very desirable for this company to fund its present bonded obligations into a single security bearing a lower rate of interest than those now outstanding and also to improve the condition of its railway, increase its equipment, buildings and facilities and also to construct from time to time as authorized by law, other extensions and railroads, so as to increase and develop the traffic of the system.

51 Therefore, resolved, that for the purpose of paying, funding, exchanging and retiring the mortgage bonds of this company now outstanding, and for constructing and acquiring extensions and additional lines of railroad, and for increasing the equipment, shops, buildings, sidings, appurtenances and facilities and improving the condition of this company's railroad, the board of directors and president and secretary of the Louisville, New Albany & Chicago Railway Company, be and they are hereby authorized and directed to issue the corporate coupon bonds of said company to be designated General Mortgage Gold Bonds, bearing interest at the rate of 5 per cent. per annum, and payable in fifty (50) years from May 1, 1890, to the amount of twenty-five thousand dollars ($25,000) per mile of main track of the present system of its railway, that is to say, five hundred and twelve (512) miles, of which ten million dollars ($10,000,000) shall be reserved and used exclusively for the purpose of paying off, purchasing, funding, exchanging and retiring the present outstanding bonds of this company to a like amount, which are secured by the different mortgages or deeds of trust upon some portion or all of its said railway; and also from time to time to issue such other bonds of the same class to the amount, and at the rate of twenty-five thousand dollars ($25,000) par value for each and every mile of main track of additional railroad actually owned by this company, either in the State of Indiana, or elsewhere, whether acquired by construction, purchase, consolidation or otherwise; and for the purpose of se-
curing the payment of said bonds, the president and secretary
52 are authorized and directed to execute in the corporate name
of this company, and on its behalf and under its corporate seal and to acknowledge and deliver unto such trustees as the board of directors shall select and appoint, a mortgage or deed of trust, bearing date May 1, 1890, conveying by way of mortgage all the railroad of this company now constructed and in operation, including all its branches, sidings and leasehold rights, and also all railroads, extensions and branches which may be hereafter created, built, purchased or acquired by this company, whether by construction, purchase, consolidation or otherwise and whether situate

within or without the State of Indiana, together with all the equipment and appurtenances at any time belonging to this company, or in use on its lines of railway wherever situate, and all and singular its property of every kind and nature, real, personal and mixed, now owned or at any time to be hereafter acquired, in possession or expectancy, including the corporate and other franchises of the company.

Exhibit to

Resolved further, That the Board of Directors of this company may adopt such form of bonds and mortgage or deed of trust as they may think proper to carry into execution the general resolve and authority aforesaid. And,

Whereas, at a meeting of the Board of Directors of said railway company, party of the first part, duly and legally called and held on March 22, A. D. 1890, the said board in pursuance of the vote and directions of the said stockholders' meeting did adopt the following resolves which are at large spread upon the records of such meetings, viz.:

53 "Be it therefore resolved,

"In execution of the authority and direction of the above and foregoing action of the stockholders of this corporation, the Board of Directors do hereby empower and instruct the president and secretary of this corporation,

"First. To prepare, sign, seal and execute an issue of its coupon bonds of the general form and tenor following, subject only to the necessary variations as to the amount and serial numbers, each of said bonds being for the sum of one thousand dollars, or five hundred dollars, as the board may determine, viz.:

UNITED STATES OF AMERICA.

No......... STATE OF INDIANA. $1,000.

General Mortgage Gold Bond.

The Louisville, New Albany and Chicago Railway Company, a corporation of the State of Indiana, for value received hereby agrees to pay to the Central Trust Company of New York, or the bearer hereof, the sum of one thousand dollars in gold coin of the United States of the present standard of weight and fineness, at the ibit to same office or agency of said railway company, in the City of New York on the first day of May, in the year one thousand nine hundred and forty, with interest thereon in the meantime, at the rate of five per cent. per annum, payable semi-annually in like gold coin, on the first days of May and November, in each year, at the said New York office or agency, upon presentation of the coupons hereto annexed as they severally become due. The principal and interest of this bond is payable without relief from valuation or 54 appraisement laws. In case of default in the payment of any coupon for a period of six months after presentation and demand, the principal of this bond may be declared to be due in the manner and with the effect and subject to the conditions contained in the mortgage or deed of trust which secures the payment hereof, as hereinafter mentioned.

This bond may be registered at the general office of the said railway company, or at its New York agency, at the option of the holder and thereafter, unless at any time registered as payable to bearer, will only be payable to such person as on this bond shall be designated from time to time as the last duly registered transferee or owner thereof.

This bond is one of a series of coupon bonds of like tenor and effect, and numbered consecutively from one upward and issuable by the said railway company under and in accordance with the terms and conditions of the mortgage or deed of trust hereinafter mentioned, for the purpose of retiring, funding and redeeming the existing bonded indebtedness of the said railway company, improving and equipping its railroad and acquiring, by construction or otherwise, extensions and branches thereof, whether in the State of Indiana or elsewhere. The total amount of bonds of this series authorized to be issued by said railway company is expressly limited by said mortgage or deed of trust as follows:

First: A present issue of twelve million, eight hundred thousand dollars, being at the rate of $25,000 per mile of main track of the present system of owned railroad of 512 miles of which 55 amount ten million dollars of bonds, numbered from 10 to 10,000, both inclusive, shall be reserved and used exclusively for the purpose of purchasing, exchanging or retiring the present outstanding mortgage bonds of said railway company to a like amount, in the manner recited in the mortgage or deed of trust.

Second: Such additional issue from time to time as prescribed in said mortgage or deed of trust as will amount to twenty-five thousand dollars par value for every mile of main track of additional railroad, extension or branch line, either constructed or acquired and owned by said railway company, whether by purchase, consolidation or otherwise and situate in the State of Indiana or elsewhere.

Exhibit

The payment of all and each of the bonds of this series, together with interest thereon, without reference to the time when any of such bonds shall be actually issued or certified, is secured by a mortgage or deed of trust of even date herewith, duly executed and delivered by the said company to the Central Trust Company of New York, and John H. Stotsenburg of Indiana, as trustees, conveying all and singular the railway, equipment, appurtenances, property, leasehold rights, terminal facilities, assets and franchises of the said railway company which it now owns, and all the railroads, extensions, branches, equipment, property and appurtenances which it may at any time hereafter own or possess, together with all privileges and franchises thereto appertaining, as in said mortgage or deed of trust is more particularly specified and described.

This bond shall not be valid, or entitled to any benefit of such 56 mortgage security until it has been duly certified by the trustee as provided in the said mortgage or deed of trust.

In witness whereof, the said Louisville, New Albany and Chicago Railway Company has caused its corporate seal to be hereto affixed and these presents to be signed by its president and attested by its secretary, and has caused each of the said coupons to be attested by the engraved signature of its secretary on this first day of May, A. D. one thousand eight hundred and ninety.

LOUISVILLE, NEW ALBANY AND
CHICAGO RAILWAY COMPANY.
[SEAL] By.....................
President.

Attest:

....
Secretary.

The coupons to be attached to such bonds shall be in the following form, and each shall have the signature of the secretary engraved thereon:

$25.

The Louisville, New Albany and Chicago Railway Company, bit to same on November 1st, A. D. 1890, will pay to bearer twenty-five dollars, at its office or agency in New York, being six months' interest on its General Mortgage Gold Bond No.................

....
Secretary.

Each of such bonds shall bear thereon a certificate to be duly signed by the Central Trust Company of New York, trustee, in the following form:

Trustee's Certificate.

This is one of a series of bonds numbered from one upward, issued by the Louisville, New Albany and Chicago Railway Company, referred to in the mortgage or deed of trust in said bond described; and this bond has been issued in accordance with the provisions of said mortgage or deed of trust.

THE CENTRAL TRUST COMPANY OF NEW YORK,
57 Trustee.
By ....,
Vice-President.

Second. The president and secretary of this company are hereby further empowered and instructed to prepare, proper form, a mortgage or deed of trust whereby, for the security and payment of the aforesaid issue of bonds and interest, this corporation shall convey and mortgage unto the Central Trust Company of New York and John H. Stotsenburg, of Indiana, as trustees, all and singular, the railroads, property, assets, equipment, appurtenances, leasehold rights, terminal facilities and franchises of this company at present owned, and all railroads, extensions, branches, property, equipment, appurtenances, leasehold rights, terminal facilities and franchises which it may hereafter own, either within or without the State of Indiana, and thereupon to sign, seal with the corporate seal, acknowledge and deliver said mortgage or deed of trust unto said trustees as the act and deed of this corporation, for the use and purposes therein expressed.

Now, therefore, this indenture witnesseth: That the said Louisville, New Albany and Chicago Railway Company, party of the first part, in consideration of the premises of and of one dollar, to it in hand paid at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained sold, assigned, set over, released, conveyed

and confirmed and by these presents doth grant, bargain, sell, **Exhibit to sa**
assign, set over, release, convey and confirm unto the
Central Trust Company of New York, and John H.
58 Stotsenburg, of the State of Indiana, parties of the second part,
and to the survivor of them, and to their successor or successors
in the trust herein and hereby created and declared, all the
present and in the future to be acquired railway system and property
of the said party of the first part of every kind and nature and
however owned, held, leased or enjoyed, together with all the equipment,
appurtenances and franchises now owned or at any time hereafter
to be acquired by it, being more particularly described as follows:
All the present line of railway, extending from New Albany,
Indiana, to Michigan City in the same State, and also from Indianapolis,
Indiana, to a point on the State line between Indiana and Illinois,
about twenty miles southeast of the City of Chicago, Illinois,
about twenty miles southeast of the City of Chicago, Illinois, and
also its proprietary and owned line of railroad, called the Bedford
and Bloomfield Railroad, extending from Bedford to Switz City, in
Indiana, and also its other proprietary and owned line of railroad,
called the Orleans, West Baden and French Lick Springs Railroad,
extending from Orleans to French Lick, Indiana, and also all its
lands, station buildings, tracks and terminal facilities in the City of
Louisville, Kentucky, and also all its rights, interest, proprietary
and leasehold estate and terminal facilities in the franchises, property,
tracks and station buildings of the Chicago and Western Indiana
Railroad Company, and in the Belt Railway Company
of Chicago, in the City of Chicago, or elsewhere in the State of
Illinois; and also all its real estate, trackage, leasehold and contract
rights and terminal properties, stations, sidings and franchises
59 in the City of Indianapolis, Indiana, and also all its leasehold
and contract rights, trackage and terminal facitities vested in
the party of the first part by virtue of its certain written contracts
with the Jeffersonville, Madison and Indianapolis Railroad Company,
the Pennsylvania Company and the Louisville Bridge Company,
whereby the trains and traffic of the said party of the first part
are moved and handled between the City of New Albany, Indiana,
and the City of Louisville, Kentucky, the before mentioned system
of railroads owned by the said party of he first part and exclusive of
tracks leased and operated by it, being about five hundred and twelve
miles in length, and situate in the Counties of Floyd, Clark, Washington,
Orange, Lawrence, Green, Monroe, Owen, Putnam, Montgomery,
Tippecanoe, White, Pulaski, Stark, La Port, Marion, Hamilton,
Boone, Clinton, Carroll, Jasper, Newton, and Lake, in the State
of Indiana, and Cook County, in the State of Illinois, and Jefferson

County in the State of Kentucky; and also all other railroads, extensions and branch lines which the railway company, party of the first part, may at any time hereafter create, own or acquire, whether by construction, purchase, consolidation or otherwise, whether within the State of Indiana, or in any other state, including and conveying by these presents all the property of every sort or nature, real, personal and mixed, now owned by said railway company and all that it may in the future add, construct or acquire, for the purposes of and connected with or appertaining to the railroads or railways above mentioned and described, whether now owned 60 or hereafter to be constructed or acquired, together with all the lands, tracks, lines, rails, bridges, ways, buildings, shops, tanks, piers, wharves, structures, erections, turntables, fences, walls, fixtures, franchises, privileges and rights of the Railway Company, and also all locomotives, engines, tenders, cars, carriages, tools, machinery, manufactured and unmanufactured materials, coal, wood and supplies of every kind belonging or appertaining to the Railway Company; also all tools, incomes, issues and profits, arising out of the said property and its operation, and all rights to receive and recover the same, also all estate, right, title and interest of the party of the first part in and to any and all real estate belonging to said party of the first part; also all leasehold lands, with the buildings thereon erected; it being the true intent and meaning of these presents that the said Railway Company, party of the first part, shall and doth convey to the said trustees all and all manner of franchises of every kind and description, however derived and wherever situate, all and all manner of real estate or interest therein, wherever such real estate may be situate, and all and all manner of personal property, of whatever nature or description the same may be, at the date of these presents owned or possessed by the said Railway Company, or which may, at any time be hereafter, during the continuance of this trust, be acquired by the said Railway Company for purposes connected with or appertaining to the railroads or railways above mentioned or described, or intended to be hereby conveyed, whether now in existence or at any time hereafter to be constructed or acquired, 61 whether within or without the State of Indiana; and also all choses in action of every kind and description, including bills receivable, book accounts, traffic balances, all books of record and all accounts of every kind and description, all papers, maps, inventories and documents in any wise referring or relating to the property or franchises hereby conveyed; and also all franchises and property and all personal rights or interest in any franchises or property, of every kind and description, real, personal or mixed, and wherever the same may be situate, that may, at any time, before or after the date of this indenture, be acquired by or for the said Railway Company, for purposes connected with or appertaining to said railroads or railways, either now owned or hereafter to be acquired, all of which it is hereby covenanted shall enure, by way of accretion, to the benefit and advantage of said trustees and by way of further and better security for the bonds to be issued hereunder; it being intended and hereby expressly covenanted that the lien of this indenture shall embrace and bind all railroads, real and personal property, choses in action, contract rights and franchises which the Railway Company now owns, or at any time hereafter may own, as fully and to the same extent as if all such property were now in existence and owned by the said Railway Company, and were specifically described herein and conveyed hereby.

To have and to hold, all and singular, the above described premises to the trustees, their and each of their successor or successors in the trust hereby created, to the only proper use and 62 behoof of the said trustees, their and each of their successor or successors in trust, for the security of the bonds and coupons to be issued hereunder and for the uses and purposes hereinafter expressed, namely:

Article I.

Until default shall be made in the payment of the principal or interest secured by said bonds, or some of them and such default shall have continued for a period of six months, as hereinafter set forth, the Railway Company shall be permitted to possess, manage, operate and enjoy all and singular the mortgaged premises, with their appurtenances and to take, demand, use and enjoy the rents, incomes, profits and issues of all and singular the premises and property hereby conveyed, in the same manner and to the same effect as if this indenture had not been made.

Article II.

It being as hereinbefore recited, one of the objects and intentions of this indenture to borrow money by means of bonds to be issued hereunder, for the purpose of paying off, funding, exchanging and retiring the present outstanding bonds of the Railway Company secured by mortgages or deed of trust upon some portion or all of the property as hereinbefore recited, it is therefore

ibit to same
covenanted and agreed that ten thousand of the bonds to be issued
hereunder and secured hereby, representing ten million dollars
($10,000,000) of principal obligation, and being numbered from
1 to 10,000, both inclusive, shall from time to time be signed,
sealed and executed by said Railway Company and thereupon certified by the Trust Company and used exclusively for the pur-
63 pose of exchanging for bonds of the Railway Company now
outstanding representing an equal amount of principal and secured by some one of the three several mortgages or deeds of
trust hereinbefore recited, that is to say:

Of the issue of its bonds amounting to three million dollars ($3,000,000), secured by its before mentioned mortgage, dated July 1, 1880, and covering the Main Line of railroad.

Of an issue of its bonds amounting to two million three hundred thousand dollars ($2,300,000), secured by its before mentioned motrgage, dated August 10, 1881, and covering the the Air Line division of such railroad.

Of an issue of its bonds called consolidated bonds, amounting to four million seven hundred thousand dollars ($4,700,000), secured by its before mentioned mortgage, dated January 1, 1886, and covering its entire line of railroad and appurtenances.

Such bond exchanges shall be made and conducted upon the terms and methods and subject to such conditions as may be agreed upon between the Railway Company and the said Trust Company.

Whenever any of the mortgage bonds of the railway company
of either of the three classes aforesaid and now outstanding shall
be exchanged for a bond of the series to be issued under this indenture, the said Trust Company shall thereupon stamp upon the
face of each of said retired and exchanged bonds that the same is
payable only to it as trustee hereunder and shall thereafter hold
the same in trust uncanceled, but wholly as collateral security for
the payment of all the bonds issued or to be issued under this
64 mortgage. Each and every of such exchanged bonds so held
by said Trust Company and each and every of the present
outstanding three mortgages or deeds of trust executed by the
Railway Company shall remain in full force and effect in all respects until all the entire series of outstanding bonds of either one
of said three different issues shall by purchase or exchange be re-

tired and be delivered unto the said Trust Company and until such time each and every of such bonds and the mortgages to secure the same shall retain all their liens, priorities and legal rights as fully as if this instrument had not been executed. The Trust Company as the holder in trust of such uncanceled bonds for the security and protection of the bonds from time to time issued under this mortgage shall have and exercise the same rights to enforce the mortgage under which any of said uncanceled bonds were issued, equally with any other holder of bonds of that class.

Whenever the entire series of bonds authorized and now outstanding of either of the three classes of securities designed to be so retired and exchanged shall actually have come by purchase, exchange or retirement into the possession of the said Trust Company as aforesaid, then it shall take the necessary and proper means to cause the mortgage or deed of trust executed by the railway company to secure that class of bonds of which the whole issue has been exchanged, to be satisfied and canceled of record and shall thereupon also cause the said whole issue of bonds of that class in its hands to be canceled and destroyed.

65 It is expressly agreed that pending the ultimate cancellation of such exchanged bonds the payment of interest upon all the bonds which may be issued and outstanding under this mortgage, shall be deemed a satisfaction of all interest accrued up to the time of such payment, upon any and all of the exchanged and retired bonds held in trust by the Trust Company and no interest shall be deemed or held to be payable upon any of such exchanged, retired and uncanceled bonds secured by this mortgage.

Article III.

The said Trust Company shall, upon the execution, delivery and record of this mortgage, and upon the request of the Board of Directors or the Executive Committee of the Railway Company, certify bonds hereunder to the amount, at face value, of two million eight hundred thousand ($2,800,000) dollars, such bonds being numbered from 10,001 upward, and shall deliver the same to the said railway company.

Any additional bonds shall be certified and issued hereunder subject to the following conditions and limitations, viz.:

Whenever any mileage of main track of railroad, in addition

ibit to same to its present system hereby conveyed, shall be from time to time acquired or built by the said railway company, either by purchase, construction, consolidation or otherwise and whether within or without the State of Indiana, and when such fact shall be made to appear to the said Trust Company by a certificate of the president or vice-president of the railway company, and an affidavit of its chief engineer, showing the exact length of the main track of additional railroads so acquired or built and the termini thereof and
66 in what State and counties the same is situate, and upon the
recording of this mortgage or deed of trust, and such other proper deed of further assurance in such counties as may be deemed necessary, according to the laws of the State or States in which such additional railroad shall be situate, said Trust Company shall, upon the request of the Board of Directors or the Executive Committee of the said railway company, certify and deliver to the latter such further issue of bonds hereunder, at the rate of, but in no event exceeding, the amount at face value of twenty-five thousand dollars per mile of the main track of railroad so acquired or created, provided, however, that if any additional railroad acquired by the said railway company, either by purchase, consolidation or otherwise shall be alreaay subject to any mortgage which is unsatisfied, then the amount of any such outstanding bonds, secured by such unsatisfied lien, shall be stated in the certificate of the president or vice-president of the said railway company, and thereupon the Trust Company shall only certify hereunder and deliver bonds to such an amount when added to such outstanding bonds secured by the unsatisfied mortgage, an such acquired additional railroad as will not exceed a total issue of twenty-five thousand ($25,000) dollars per mile of such main track so acquired.

The certificate of the President or Vice-President and the affidavit of the chief engineer of such Railway Company, shall in all cases be conclusive as to the mileage and liens recited and shall constitute full and complete authority for the said Trust Company to certify and deliver bonds hereunder at the rate per mile
67 herein provided for.

It is also expressly agreed that the said Trust Company shall from time to time, on request of the Board of Directors or Executive Committee of the said Railway Company, certify and deliver bonds hereunder (subject always to the limitation of twenty-five thousand (425,000) dollars per mile of main track) to the effect of simultaneous exchange or retirement of a like amount of any bonds which may constitute a prior and specific lien on any additional

Exhibit

railway property at the time when it may be hereafter acquired by the said Railway Company, party of the first part.

Article IV.

In case default in the payment of interest on any of the bonds secured by this indenture, shall be made and shall continue for the space of six months after such payment shall be duly demanded, then the trustees may, and if requested in writing by the holders of the majority of the bonds secured hereby and then outstanding, shall enter upon all and singular the mortgaged premises and every part thereof, and possess, operate, use and enjoy the same; and upon demand in writing being made by the trustees, the Railway Company shall immediately surrender possession of all and singular the mortgaged premises and property of every sort and description to the trustees. It shall also be lawful for the trustees, in case such default shall be made and continue as aforesaid and payment be demanded and in case such request of bondholders be made, as aforesaid, they shall do so, to sell and dispose of all the premises
and property of every sort and description, hereby conveyed,
68 at public auction, in the City of New York or in Chicago,
Illinois, as the Trustees may elect (such election, however, being subject to a right on the party of a majority in amount of the bondholders to designate at which of the two said places the sale shall be made), having first given notice of the time and place of such sale, by advertisement published not less than once a week, for three months next preceeding the time specified for the sale, in one or more newspapers published in the City of New York, and in one or more newspapers published in the City of Chicago, Illinois, and to adjourn the said sale from time to time, by announcement at the time and place advertised, without further advertisement, and to make and deliver to the purchaser or purchasers good and sufficient deed or deeds, in fee simple, which sale being made to the highest bidder, shall be a perpetual bar, both at law and in equity against the Railway Company and all other persons lawfully claiming the above described premises and property, or any part thereof, or any lien upon or interest in the same, through or from the said Railway Company, and after deducting from the proceeds of such sale a just allowance for all expenses thereof, including reasonable attorney and counsel fees, and any other necessary expenses incurred by the trustees in executing their trusts, including their own reasonable compensation, to apply the proceeds to the payment of the principal of such of the aforesaid bonds as may be at the time outstanding and unpaid, whether the same shall

or shall not have previously become due according to their
tenor, and of the interest which shall at the time have
69 accrued on said principal and be unpaid, without discrimination
or preference, but ratably according to the aggregate
amount of such unpaid principal and such accrued and unpaid interest,
and if after satisfaction thereof a surplus shall remain, to
pay the same over to the Railway Company.

Article V.

In case default in the payment of interest on any of the bonds secured by this indenture shall be made and shall be duly demanded, then the trustees if they shall elect so to do, may, and if requested in writing by the holders of one half of the bonds secured hereby and then outstanding, shall apply to some court or courts having proper jurisdiction in the premises, for a foreclosure of this deed of trust or mortgage and sale of the mortgaged property and premises and therein embraced, and for the appointment in the meantime of a receiver of all the mortgaged premises under this indenture, whether now owned or hereafter to be acquired. In the event of such right of foreclosure and sale accruing for non-payment of interest, immediately thereupon the whole amount of the principal of the bonds secured by this indenture, and then outstanding, shall at the option of a majority in amount of the holders of all the bonds issued hereunder and then outstanding, to be expressed in writing to the trustees, become at once due and payable.

Article VI.

If the trustees shall enter upon the mortgaged premises and
70 take possession, control and management thereof under any
preceeding provision, they shall apply and administer the net
revenue and income arising from the mortgaged premises during such possession, in the discharge and satisfaction of interest and principal secured by this indenture, as the same may become due and payable and in due order of priority. During such possession, occupation, control and management, the trustees shall only be liable for the exercise of good faith and of reasonable diligence and all expenses, loss and damage of every kind and nature growing out of such possession, control and management shall, to the extent that any liability is incurred thereby, constitute a charge upon the mortgaged premises exclusively.

The trustees during such possession shall have the right and power to manage the property and premises and may enter into any and all contracts proper, ordinary and usual in such cases and generally do and perform such things in the premises as the Railway Company itself might do and perform had it remained in undisputed possession and control of the said property.

Article VII.

Any right of action under this indenture is vested exclusively in the trustees and under no circumstances shall any bondholder or any number of bondholders have any right to institute an action or other proceedings on or under this indenture for the purpose of enforcing any remedy herein and hereby provided; and all actions and proceedings, whether by suit, entry or otherwise, for the
71 purpose of enforcing the provisions of this indenture shall be instituted and conducted by the trustees according to their sound discretion until the owners and holders of a majority of the bonds secured hereby and then outstanding shall unite in requesting in writing the trustees to do or refrain from doing some particular act or acts, or to pursue or to refrain from pursuing any particular line of conduct or policy connected with the enforcement of such security, accompanying such request with evidence to the satisfaction of the trustees that they are such actual owners of bonds and also with satisfactory indemnity to the trustees for all expenses and costs of every kind and also for all possible claims for damages; in which event the trustees shall conform to and carry out such written instructions and such written request and direction, and the acts of the trustees done in execution thereof shall be binding on all holders of bonds issued hereunder.

Article VIII.

In case of any sale of the premises embraced in this mortgage under a decree of any court having jurisdiction thereof, based on the foreclosure of this mortgage, or in the pursuance of advertisement without such decree as aforesaid, the trustees may, in their discretion, purchase, and they are hereby fully authorized and empowered to purchase the premises, property and franchises embraced herein, for the use and benefit of the holders of the
72 then outstanding bonds secured by this mortgage and having so purchased the said premises, property and franchises, the right and title thereto shall vest in the trustees, and no bondholder shall have any claim thereto or to the proceeds thereof, except for his pro rata share of the proceeds of said purchased premises,

hibit to same property and franchises, as represented in a new company or corporation, to be formed for the use and benefit of the holders of the bonds secured hereby and then outstanding; and the trustees may take such lawful measures as they may deem best for the interest of the bondholders, to organize or procure the organization of a new company or corporation for the benefit of the holders of the bonds secured by this indenture for the benefit of the holders of the bonds secured by this indenture and then outstanding. The said new company or corporation shall be organized upon such terms, conditions and limitations and in such manner as the holders of a majority of the then outstanding bonds secured by this mortgage shall in writing request or direct; and provision may, if such majority shall so elect, but not otherwise, be made in the organization of such new company or corporation for the interests of any or all of the holders of junior obligations of the Railway Company and for its stockholders and simple contract creditors, or any of them, and the trustees so purchasing shall thereupon convey the premises, property and franchises, so purchased by them, to such new company or corporation.

Article IX.

73 The Railway Company reserves and retains for itself, its successors and assigns, the right to sell, lease, and otherwise dispose of, free from the lien of this mortgage or deed of trust, any real or personal property now covered or affected or hereafter to be covered or affected, by this mortgage, which may no longer be required by the Railway Company for the purposes of its incorporation; provided however, that the proceeds of such sale, lease or disposition, shall be received by the trustees, if deemed necessary for the protection of the bonds issued hereunder, and be applied by them to the purchase of other property in the name of the Railway Company, to be subject to the lien hereof, or be applied to the purchase of bonds secured hereby, which bonds shall be thereupon canceled. Any conveyance by the Railway Company of any such real or personal property, in which the trustees shall join, shall convey the same free and discharged of any lien hereby created, if a recital to such effect shall be continued in such conveyance, but not otherwise; and in ces of such recital this indenture shall, as to the property so conveyed, be thereafter void and of no effect, and no obligation shall be imposed on the purchaser to see to the application of the purchase money.

Article X.

No holder of any bond hereby secured shall have recourse for

payment to any stockholder, or make any demand for the payment of any such bond against any such person under and in pursuance of any law imposing liability upon any stockholders of incorporated companies, whether such law be now in force or shall hereafter be enacted, or by reason of any cause whatever and the Railway
74 Company hereby expressly waives the benefit of any appraisal, stay or exemption law that may or at any time be in force and consents that any sale that may be and under the provisions of this mortgage shall be had in the same manner, and to the same effect, as if such appraisal, stay or exemption law did not exist.

Article XI.

If the Railway Company shall well and truly pay the sums of money due upon the said bonds secured hereby, and the coupons thereto attached, required to be paid by it, which it hereby covenants to do, and shall well and truly keep and perform all the covenants, agreements and undertakings herein and hereby entered into and required to be kept and performed, according to the true intent and meaning of these presents, then in that case, the estate, right, title and interest of the trustees in the above described mortgaged property and premises shall cease, determine and become wholly void.

The trustees shall only be responsible for reasonable diligence in the management of the trust and shall not be answerable in any case for the act or default of any agent, attorney or employe selected with reasonable discretion. The trustees shall be entitled to be reimbursed for all proper outlays of every sort and nature, by them incurred in the discharge of this trust and to receive a reasonable and proper compensation for any duty they may at any time perform in the discharge of the same; and all such fees, commissions, compensations and disbursements shall constitute a lien on the mortgaged property and premises.

Article XII.

75 In case the office of trustee under this indenture shall become vacant by reason of incapacity, removal or resignation of the said parties of the second part, or either of them, or any successor, it shall be lawful for the holders of a majority in amount of the bonds hereby secured and then outstanding, to appoint a successor or successors, by a writing by them signed and upon such appoint-

hibit to same

ment being made and said trust being accepted and written notice thereof to said railway company, any such successor or successors, substituted trustee or trustees, shall, without further act or deed, become vested with all and singular, the estate, right and powers, and shall perform all the duties of trustee in like manner and with the same effect as if it, they or he had been named in this instrument as trustee or trustees.

The word "trustee," "trustees" or successors," wherever used in this instrument, shall mean the trustees under this mortgage for the time being, whether original or substituted, with all the powers appertaining to its, his or their office.

Article XIII.

The railway company hereby agrees that it will well and truly pay the sum of money in the said bonds and in each of and all of them mentioned, together with the semi-annual interest due and to become due thereon, at the times and in the manner and at the places specified therein; and further that it will well and truly pay, or cause to be paid, all taxes, charges, rates, levies and assessments imposed, assessed or levied, upon the premises and property hereby
mortgaged, conveyed and assigned, or intended so to be, or
76 any part thereof, and shall and will, at its own proper cost, ex-
pense and charge, do or cause to be done or performed, in order to preserve and keep valid and intact this lien or encumbrance upon all and singular the property and premises above described. The said railway company further agrees that it will, at all times hereafter maintain an office or agency in the City of New York for the registration of and the payment of interest upon the bonds issued hereunder.

Article XIV.

It is expressly agreed that no bond of this issue shall be valid until the certificate on the back thereof has been duly signed by the said Trust Company and that all bonds certified and issued hereunder shall have equal rights and security, no matter when the same are issued.

Article XV.

If the railway company, or its successors, shall well and truly pay, or cause to be paid, the several principal sums of money evidenced by the bonds legally issued at any time hereunder and the coupons thereto attached, as they severally mature, according to the true intent and meaning of these presents, then and in such case the estate, right, title and interest of the trustees, parties of the second part, in and to each and every part of the property hereby mortgaged or intended to be shall at once and without further act or deed cease and determine and this indenture shall thenceforth become void and of no effect. **Exhibit to**

77 And it is further covenanted and agreed by the Railway Company to and with the trustees, that it will, from time to time and at all times, upon reasonable request, make, execute, acknowledge and deliver, at its own expense, all such further acts, deeds, conveyances and assurances in law for the better assurance unto the trustees, upon the trusts and for the purposes herein expressed or intended, all and singular the property of every sort and description hereby mortgaged or conveyed in trust, or appearing, purporting, or intended to be, now owned, or possessed by, or vested in the said Railway Company, or that may hereafter be owned, possessed, acquired or vested in the Railway Company, as by the trustees or by their counsel learned in the law shall be reasonably, advised or required.

In witness whereof, the said Louisville, New Albany and Chicago Railway Company, the said party of the first part has caused these presents to be signed by its president, sealed with its corporate seal, and attested by its secretary; and to testify their acceptance of the trust hereby created, the said Central Trust Company of New York has caused this instrument to be signed in its behalf by its president, sealed with its corporate seal and attested by its secretary, and the said John H. Stotsenburg has hereunto affixed his hand and seal the day and year first above written.

LOUISVILLE, NEW ALBANY AND
[SEAL] CHICAGO RAILWAY CO.,
By WM. L. BREYFOGLE,
President.
Attest: W. H. LEWIS,
Secretary.
Witness:
JOHN MARSHALL,
JOHN B. HUGHES.

78 CENTRAL TRUST COMPANY OF NEW YORK,
[SEAL] By F. P. OLCOTT,
President.
Attest: C. H. P. BABCOCK,
Secretary.
Accepted, JOHN H. STOTSENBURG.

hibit to same STATE OF ILLINOIS, }
COUNTY OF COOK. } ss.

Be it remembered, that on this third day of May, A. D. 1890, before me, a Notary Public, residing in said State and County, personally appeared William L. Breyfogle, president of the Louisville, New Albany and Chicago Railway Company, personally known to me to be the real person, whose name is subscribed to the foregoing instrument, and acknowledged that he, in behalf of said railway company, and by authority of its board of directors, had signed and delivered the said instrument, as the free and voluntary act of the said railway company, for the uses and purposes therein set forth; also personally appeared before me at the same time William H. Lewis, secretary of said railway company, personally known to me to be such secretary, and personally known to me to be the real person whose name is subscribed to the foregoing instrument, and acknowledged that he, on behalf of said railway company, and by like authority had signed the said instrument, and affixed thereto the official corporate seal of said railway company, as the free and voluutary act of the said Louisville, New Albany and Chicago Railway Company for the uses and purposes therein set forth, that he knew the corporate seal so 79 affixed is said corporate seal.

In witness whereof, I have hereunto set my hand, and affixed my official seal this third day of May, 1890.

[SEAL]

WM. L. KINNAN,
Notary Public.

STATE OF INDIANA, }
COUNTY OF FLOYD. } ss.

The foregoing instrument was filed for record in the recorder's office of Floyd County, on the........day of May, A. D. 1890, at....o'clock in the....of that day, and duly recorded in Book....of Mortgages, on page....and following.

....
Recorder of Floyd County.

STATE OF INDIANA, }
COUNTY OF CLARK. } ss.

The foregoing instrument was filed for record in the record-

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er's office of Clark County, on the........day of May, 1890, at ....o'clock in the....of that day, and duly recorded in Book.... of Mortgages, on page....and following.

....

Recorder of Clark County.

STATE OF INDIANA,
COUNTY OF WASHINGTON. } ss.

The foregoing instrument was filed for record in the recorder's office of Washington County on the........day of May, 1890, at ...o'clock in the....of that day, and duly recorded in Book ....of Mortgages, on page ...and following.

80 ....

Recorder of Washington County.

STATE OF INDIANA,
COUNTY OF ORANGE. } ss.

The foregoing instrument was filed for record in the recorder's office of Orange County on the........day of May, 1890, at....o'clock in the....of that day, and duly recorded in Book ....of Mortgages, on page....and following,

....

Recorder of Orange County.

STATE OF INDIANA,
COUNTY OF LAWRENCE. } ss.

The foregoing instrument was filed for record in the recorder's office of Lawrence County on the........day of May, 1890, at....o'clock in the....of that day, and duly recorded in Book ....of Mortgages, on page....and following.

Recorder of Lawrence County.

STATE OF INDIANA,
COUNTY OF MONROE. } ss.

The foregoing instrument was filed for record in the recorder's office of Monroe County on the........day of May, 1890, at....o'clock in the....of that day, and duly recorded in Book ....of Mortgages, on page....and following.

....

Recorder of Monroe Connty.

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State of Indiana,
County of Owen. } ss.

81 The foregoing instrument was filed for record in the recorder's office of Owen County on the........day of May, 1890, at....o'clock in the....of that day, and duly recorded in Book ....of Mortgages, on page....and following.

....
Recorder of Owen County.

State of Indiana,
County of Putnam. } ss.

The foregoing instrument was filed for record in the recorder's office of Putnam County on the........day of May, 1890, at....o'clock in the....of that day, and duly recorded in Book....of Mortgages, on page....and following.

....
Recorder of Putnam County.

State of Indiana,
County of Montgomery. } ss.

The foregoing instrument was filed for record in the recorder's office of Montgomery County on the........day of May, 1890, at....o'clock in the....of that day, and duly recorded in Book....of Mortgages, on page....and following.

....
Recorder of Montgomery County.

State of Indiana,
County of Tippecanoe. } ss.

The foregoing instrument was filed for record in the recorder's office of Tippecanoe County on the........day of May, 1890, at....o'clock in the....of that day, and duly recorded in Book.... of Mortgages, on page....and following.

....
Recorder of Tippecanoe County.

State of Indiana,
County of White. } ss.

The foregoing instrument was filed for record in the record-

Exhibit to

82 er's office of White County on the........day of May, 1890, at....o'clock in the....of that day, and duly recorded in Book....of Mortgages, on page....and following.

Recorder of White County.

STATE OF INDIANA, }
COUNTY OF PULASKI. } ss.

The foregoing instrument was filed for record in the recorder's office of Pulaski County on the........day of May, 1890, at ....o'clock in the ...of that day, and duly recorded in Book.... of Mortgages, on page....and following.

....

Recorder of Pulaski County.

STATE OF INDIANA, }
COUNTY OF STARK. } ss.

The foregoing instrument was filed for record in the recorder's office of Stark County, on the........day of May, 1890, at ....o'clock in the....of that day, and duly recorded in Book.... of Mortgages, on page ..and following.

....

Recorder of Stark County.

STATE OF INDIANA, }
COUNTY OF LAPORTE. } ss.

The foregoing instrument was filed for record in the recorder's office of Laporte County, on the........day of May, 1890, at....o'clock in the....of that day, and duly recorded in Book ....of Mortgages, on page....and following.

83 ....

Recorder of Laporte County.

STATE OF INDIANA, }
COUNTY OF MARION. } ss.

The foregoing instrument was filed for record in the recorder's office of Marion County, on the .... day of May, 1890, at .... o'clock in the .... of that day, and duly recorded in Book .... of Mortgages, on page .... and following.

....,

Recorder of Marion County.

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STATE OF INDIANA,
COUNTY OF HAMILTON.

The foregoing instrument was filed in the recorder's office of Hamilton County, on the........ day of May, 1890, at .... o'clock in the .... of that day, and duly recorded in Book .... of Mortgages, on page .... and following.

............................,
Recorder of Hamilton County.

STATE OF INDIANA,
COUNTY OF BOONE. } ss,

The foregoing instrument was filed for record in the recorder's office of Boone County, on the .... day of May, 1890, at .... o'clock in the .... of that day, and duly recorded in Book .... of Mortgages, on page .... and following.

....
Recorder of Boone County.

STATE OF INDIANA,
COUNTY OF CLINTON. } ss.

The foregoing instrument was filed for record in the recorder's
84 office of Clinton County, on the .... day of May, 1890,
at .... o'clock in the .... of that day, and duly recorded in
Book .... of Mortgages, on page .... and following.

..............................,
Recorder of Clinton County.

STATE OF INDIANA,
COUNTY OF CARROLL. } ss.

The foregoing instrument was filed for record in the recorder's office of Carroll County, on the .... day of May, 1890, at .... o'clock in the .... of that day, and duly recorded in Book .... of Mortgages, on page .... and following.

........................,
Recorder of Carroll County.

STATE OF INDIANA,
COUNTY OF JASPER. } ss.

The foregoing instrument was filed for record in the recorder's office of Jasper County, on the .... day of May, 1890, at ....

o'clock in the .... of that day, and duly recorded in Book .... of Mortgages, on page .... and following.

........................,
Recorder of Jasper County.

STATE OF INDIANA, }
COUNTY OF NEWTON. } ss.

The foregoing instrument was filed for record in the recorder's office of Newton County, on the .... day of May, 1890, at .... o'clock in the .... of that day, and duly recorded in Book .... of Mortgages, on page .... and following.

........................,
85 Recorder of Newton County.

STATE OF INDIANA, }
COUNTY OF LAKE. } ss.

The foregoing instrument was filed for record in the recorder's office of Lake County, on the................day of May, 1890, at....o'clock in the....of that day, and duly recorded in Book....of Mortgages, on page....and following.

....
Recorder of Lake County.

STATE OF KENTUCKY, }
COUNTY OF JEFFERSON. } ss.

The foregoing instrument was filed for record in the recorder's office of Jefferson County, on the....day of May, 1890, at........o'clock in the....of that day, and duly recorded in Book....of Mortgages, on page....and following.

....
Recorder of Jefferson County.

STATE OF ILLINOIS, }
COUNTY OF COOK. } ss.

The foregoing instrument was filed for record in the recorder's office of Cook County, Illinois, on the....day of May, 1890, at....o'clock in the....of that day, and duly recorded in Book....of Mortgages, on page....and following.

....
Recorder of Cook County.

86 And now comes the defendants, John H. Barker and The Farmers' Loan and Trust Company, by Turner, McClure & Rolston, their solicitors; and the defendant, the Louisville, New Albany & Chicago Railway Company, by G. W. Kretzinger, its solicitors; and the defendant, James Murdock, by Henry W. Calhoun, his solicitor; and enter their appearance herein.

And at the same time, on said 12th day of November, 1896, before the Honorable William A. Woods, Judge of said court, the following further proceedings in the above entitled cause were had to-wit:

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Come now the complainants, by Turner, McClure & Rolston, their solicitors, and file their bill of complaint herein, in cause No. 9,401, in the words following, to-wit:

To the Honorable, the Judges of the Circuit Court of the United States for the District of Indiana, in equity sitting:

The Farmers' Loan and Trust Company, a corporation duly created by and under the laws of the State of New York, and a citizen of the State of New York, having its principal office 87 and place of abode in the City of New York, and John H. Barker, a citizen of the State of Indiana, residing in Michigan City in said State of Indiana, bring this their bill of complaint, against the Louisville, New Albany and Chicago Railway Company, a corporation duly created and existing under the laws of the State of Indiana and Kentucky, and having its office and place of abode in the State of Indiana; and against the Central Trust Company of New York, a corporation duly created by and under the laws of the State of New York, and a citizen of the State of New York, having its principal office and place of abode in the City of New York; and against James Murdock, a citizen of the State of Indiana, residing in Lafayette in said State of Indiana; and against John H. Stotsenburg, a citizen of the State of Indiana, residing in New Albany, in said State of Indiana.

And thereupon your orators complain and say:

I. Your orator, the Farmers' Loan and Trust Company, is a corporation duly created under the laws of the State of New York, and as such corporation is fully authorized and empowered

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to hold in trust the property conveyed to it in trust, as hereinafter fully stated, and to execute the trusts reposed in it under and by virtue of the mortgage or deed of trust hereinafter described; and your orator, John H. Barker, is a citizen of the State of Indiana.

II. The defendant, the Louisville, New Albany and Chicago Railway Company (hereinafter called the Railway Company) is a corporation duly incorporated and existing under the laws of the States of Indiana and Kentucky, with corporate capacity 88 to own and operate a railroad in said States and also to acquire, lease and operate additional lines of railroad in those and other States; the defendant, the Central Trust Company of New York, is a corporation duly incorporated and existing under the laws of the State of New York; and the defendants, James Murdock and John H. Stotsenburg, are citizens and each of them is a citizen of the State of Indiana.

III. On or about the first day of July, 1880, the defendant, the Railway Company, made its certain mortgage or deed of trust, by which it conveyed to John C. New, of Indianapolis, in the State of Indiana, and Washington C. DePauw, of New Albany, in the State of Indiana, as trustees, all its Main Line of Railroad and all its rolling stock and other property, acquired for use in connection with its said Main Line, and all its franchises, including its franchise to be a corporation, to secure an issue of its six per cent. bonds, bearing date July 1, 1880, payable July 1, 1910; and under the said mortgage there are now outstanding such bonds issued by said defendant, the Railway Company, to the aggregate amount of three million dollars. To the said mortgage, which is commonly known as the Main Line Mortgage, or to a duly certified copy thereof, your orator prays to refer as a part of this its bill of complaint.

IV. On or about the tenth day of August, 1881, the defendant, the Railway Company, made its certain other mortgage or deed of trust, by which it conveyed to John C. New, of Indianapolis, in the State of Indiana, as trustees, all its Air Line of railroad and all of its rolling stock and other property acquired 89 or to be acquired for use in connection with its said Air Line, and all its franchises, including its franchise to be a corporation, to secure an issue of its six per cent. bonds, bearing date August 10, 1881, payable August 1, 1911; and under the said mortgage there are now outstanding such bonds issued by said defendant, the Railway Company, to the aggregate amount of two

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million three hundred thousand dollars. To the said mortgage, which is commonly known as the Air Line Mortgage, or to a duly certified copy thereof, your orator prays to refer as a part of this bill of complaint.

V. Subsequently, and on the first day of January, 1886, the bonds issued under and secured by the above recited mortgage and each of them being outstanding and unpaid, the railway company, for the purpose of securing the payment of a further series of bonds of the railway company, executed, acknowledged and delivered, as party of the first part, to your orators, the Farmers' Loan and Trust Company and John H. Barker, as trustees, as parties of the second part, its certain other mortgage or deed of trust, known as its Consolidated Mortgage, wherein and whereby it conveyed and transfered to your orators, and to their successor or successors and assigns, all the following property and premises by the following description, to-wit:

"All the railway of the party of the first part in the city of Louisville, in the State of Kentucky, and extending from New Albany, on the Ohio river, to Michigan City in the State of Indiana, and from the city of Chicago, in the State of Illinois, to the Indiana State line, under a leasehold right, and from said State line to
90 the city of Indianapolis, in the State of Indiana, including the railway lying and being in all of said cities, and terminal rights and facilities and approaches thereto, the same being about four hundred and seventy-five miles in length, and running through the counties of Floyd, Clark, Washington, Orange, Lawrence, Monroe, Owen, Putnam, Montgomery, Tippecanoe, White, Pulaski, Stark, Laport, Marion, Hamilton, Boone, Clinton, Carroll, Jasper, Newton and Lake, in said State of Indiana, and Jefferson county in said State of Kentucky, and Cook county in said State of Illinois, and also all branches thereof, including all the property of every sort or nature now owned by said railway company, and all that it may in the future acquire for the purposes and connected with or appertaining to the railroads or railways above mentioned and described together with all the lands, tracks, lines, rails, bridges, ways, buildings, piers, wharves, structures, erections, fences, walls, fixtures, franchises, privileges and rights of the railway company, and also the locomotives, engines, tenders, cars, carriages, tools, machinery, manufactured and unmanufactured materials, coal, wood and supplies of every kind, belonging or appertaining to the railway company, also all the tolls, incomes, issues and profits, arising out of the said property, and all rights to receive and recover the same, also all estate,

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right, title and interest of the party of the first part, in and to any and all real estate belonging to the said party of the first part, also all leasehold lands, with the buildings thereon erected, it being the true intent and meaning of these presents, that the
91 said railway company shall and doth convey to the said trustees, all and all manner of franchises of every kind and description, however derived and wherever situate, all and all manner of real estate or interest therein, wherever such real estate may be situate, and all and all manner of personal property, of whatever nature or description the same may be, at the date of these presents owned or possessed by the said railway company, or which may at any time hereafter during the continuance of this trust be acquired by the said railway company for purposes connected with or appertaining to the railroads or railways above mentioned or described; and also all choses in action, of every description, including bills reeeivable, book accounts, traffic balances, all books of record and all accounts of every kind and description, all papers, maps, inventories and documents in any wise referring or relating to the property or franchises hereby conveyed; and also all franchises and property and all personal rights or interest in any franchises or property of every kind or description, real, personal or mixed, and wherever the same may be situate, that may at any time, before or after the date of this indenture, be acquired by or for the said Railway Company, for purposes connected with or appertaining to said railroads or railways; all of which it is hereby covenanted shall inure by way of accretion to the benefit and advantage of said trustees, and by way of further and better security."

VI. The said consolidated mortgage was made and was therein recited as made subject always to the prior lien of the above recited Main Line Mortgage and Air Line Mortgage, date respectively July 1, 1880, and August 10, 1881, and to the bonds issued and to be issued thereunder.

92 VII. The said consolidated mortgage was so made as aforesaid to secure a series of consolidated mortgage bonds to be made by the said Railway Company, dated January first, 1886, each of the sum of one thousand dollars aggregating ten million dollars of principal, payable on the first day of April, 1896, in the United States gold coin of the then present standard weight and fineness, and interest thereon in the meantime at the rate of six per cent. per annum, payable semi-annually in like gold coin on the first day of April and on the first day of October in each year, upon presentation and surrender of certain coupons or interest warrants thereto

annexed as they might severally respectively mature, free from all United States Government tax. Upon each of said bonds there was a certificate, made by your orator, the Farmers' Loan and Trust Company, stating that said bond was secured by the mortgage therein mentioned, being the consolidated mortgage above described; all of which, by the said bonds and each of them and the said certificates thereon, to which your orators for greater certainty refer, will more fully and at large appear.

VIII. The said consolidated mortgage was and is the proper act and deed of the Railway Company, by it authorized, made and delivered in all respects in conformity with law; and the same was duly recorded in the office of the Recorder of the County of Floyd, in the State of Indiana, on the 14th day of January, 1886, in Book 15 of Mortgages, on pages 317 and following, and also in a
93 large number of other clerks' and recorders' offices in counties
where property affected thereby was situated; and the same is a valid conveyance for the purposes therein stated. The trusts therein and thereby created were duly accepted by your orators before the recording of the said consolidated mortgage as aforesaid. Your orators attach to this, their bill of complaint, as Exhibit "A," a copy of said consolidated mortgage, and, referring thereto, pray that the same may be taken as part hereof.

IX. Under and by virtue of the said Consolidated Mortgage or deed of trust, your orator, the Farmers' Loan and Trust Company, being thereunto duly requested, certified, in the form set forth therein, four thousand seven hundred of the bonds mentioned and described in the said Consolidated Mortgage and to secure which the same was executed and delivered as aforesaid, aggregating four million seven hundred thousand dollars of principal; and a large number of said bonds are outstanding and existing obligations on the part of the Railway Company.

X. Default has been made by the defendant, the Railway Company, in the payment on the first day of October, 1896, of the coupon interest due on that day on all the said Consolidated Mortgage bonds which have been issued and are outstanding as aforesaid, and all interest on all the said bonds from that day remains overdue and unpaid, including the interest due on that day as aforesaid. Demand has been duly made of the Railway Company and of its receivers for the payment of the interest on some of the bonds which fell due as aforesaid, and payment of the same has been refused.

Bill of Com- plaint of C Trust Co. Barker.

94 XI. The owners and holders of a large number of said Consolidated Mortgage bonds have requested in writing your orators to commence this suit and to forclose the said Consolidated Mortgage or deed of trust. The owners of the bonds secured thereby are numerous and the names and residences of many of such bond holders are unknown to your orators, so that your orators cannot allege with greater certainty than they have already done the number of said bonds outstanding, constituting valid claims against the said defendant, the Railway Company, or the amount of the indebtedness by virtue of the same.

XII. On or about the 18th day of May, in the year 1886, the defendant, the Railway Company, made and entered into a certain agreement, known as its Collateral Trust Agreement, bearing date that day, wherein and whereby the said defendant, the Railway Company, as party of the first part, covenanted and agreed with your orators the Farmers' Loan and Trust Company and John H. Barker, as Trustees, parties of the second part, to deposit and pledge with your orator, the Farmers' Loan and Trust Company (1) Ten thousand shares of the capital stock of the Chicago and Western Indiana Railroad Company, then owned by the defendant, the Railway Company; (2) Four hundred shares of the capital stock of the Belt Railway Company of Chicago, then owned by said defendant, the Railway Company; (3) Twelve thousand shares of the capital stock of the Bedford and Bloomfield Company, then owned by the defendant, the Railway Company; and (4), any and all other stocks or bonds of branch roads, railroads or extensions which might be thereafter required by the defendant, the Railway Com-
95 pany, by the use of any of the Consolidated bonds, or the
proceeds thereof, reserving and retaining, however, from said deposit and pledge in respect of each company the stock of which was to be deposited and pledged, such an amount of stock as it might be necessary to keep outstanding in different hands for the purpose of maintaining the organization of such company; and for the purpose of giving effect to such deposit and pledge, the defendant, the Railway Company, did, in and by said Collateral Trust Agreement, further covenant and agree that it would, at or prior to the deposit and pledge therein contemplated, execute full and sufficient instruments, or cause to be executed by the person or persons in whose names the stocks and bonds which were to be deposited and pledged might stand, full and sufficient instruments of assignment and transfer of said stock and bonds to your orator, the Farmers' Loan and Trust Company, as Trustee, which instruments

of assignment and transfer should severally contain a power of attorney fully authorizing the Farmers' Loan and Trust Company to transfer to itself as trustee, on the books of the Company to whose stock or bonds the assignment or transfer might relate the stock or bonds covered by such instruments of assignment or transfer.

XIII. In and by said Collateral Trust Agreement it was further, among other things, covenanted and agreed by said Railway Company that the stocks and bonds which should be deposited and pledged as therein provided should be held by your orator,
the Farmers' Loan and Trust Company, as Trustee, and its
96 successor or successors in trust, for the following uses, that is
to say, among other things, to secure the payment of the principal and interest of all the said Consolidated bonds, and for the use and benefit of the person or persons, firm or firms, body or bodies politic or corporate, who at any time might become the purchasers and holders, owners or bearers of either or any of the said bonds, and subject to the terms, provisions and stipulations in the said bonds contained, and in case of default in the payment of interest on any of said Consolidated bonds should be made and should continue for the space of six months, then and in that event the stocks and bonds which should have been deposited and pledged, as therein provided, should be deemed to be part and parcel of the property described in and intended to be covered by the said Consolidated Mortgage of January 1, 1886, and all provisions in said mortgage which apply in such case to the property therein described and referred to should apply to the stocks and bonds which should be deposited and pledged as aforesaid, and that except as therein expressly provided, the rights, duties and liabilities of the parties thereto, and of the holders of said Consolidated bonds with reference to the stocks and bonds, which should be deposited and pledged as therein provided, should be the same as is provided in said Consolidated Mortgage of January 1, 1886, with reference to the property covered by said mortgage. Your orators attach to this their bill of complaint as Exhibit "B" a copy of said Collateral Trust Agreement, and referring thereto pray that the same may be taken as part hereof.

XIV. In accordance with the terms of said Collateral Trust
97 Company, has deposited with your orator, the Farmers' Loan
and Trust Company, as trustee, as aforesaid (1) nine thousand nine hundred and ninety-nine shares of the capital stock of the Chicago and Western Indiana Railroad Company, of the par value of one hundred dollars each; (2) two thousand three hundred and

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ninety-nine shares of the capital stock of the Belt Railway Company of Chicago, of the par value of one hundred dollars each; (3) eleven thousand nine hundred and ninety shares of the capital stock of the Bedford and Bloomfield Company of the par value of fifty dollars each; and (4) two thousand nine hundred and ninety shares of the Orleans, West Baden and French Lick Springs Railway Company of the par value of one hundred dollars each, and your orator, The Farmers' Loan and Trust Company, now holds said shares of stock in accordance with the provisions of said Collateral Trust Agreement.

XV. The defendant, the Railway Company, is insolvent and wholly unable to pay its debts and obligations, and the property and premises by the mortgages or deeds of trust above recited are and constitute very inadequate security for the payment of the amounts due on the said bonds. The property covered by the said consolidated mortgage or deed of trust, as your orators are informed and believe, is so situated that it cannot, nor can any part thereof be sold in parcels without great injury to the beneficiaries under your orators' trust hereinbefore set forth.

XVII. In a certain cause now pending in this court, in which 98 cause one John T. Mills, Jr., is complainant, and the defendant, the Louisville, New Albany and Chicago Railway Company, is defendant, such proceedings were had that on the 24th day of August, 1896, one William H. McDoel, of Chicago, in the State of Illinois, was duly appointed receiver of all the property of every sort and description of the defendant, the Louisville, New Albany and Chicago Railway Company; and said William H. McDoel, as such receiver, duly entered upon and is now in possession of the property of the said defendant, the Louisville, New Albany and Chicago Railway Company, and is managing and operating the same as such receiver.

XVIII. The defendant, the Central Trust Company of New York, James Murdock and John H. Stotsenburg, as your orators are informed and believe, have or claim to have some interest in or lien upon the property and premises described in said consolidated mortgage, but your orators allege that such interest or lien, if any, has accrued subsequently to said consolidated mortgage or deed of trust so made to your orators as aforesaid, and is in all respects junior and inferior to the lien thereof.

XIX. In consequence of the embarrassed condition of the

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financial affairs of the railway company and on account of the many difficulties which are manifest upon and from the allegations hereinbefore contained, involved in the execution of your orators' said trust, it is impossible for your orators, as trustees under the said consolidated mortgage or deed of trust, to execute their said trust in the way and manner specified and provided in and by the said consolidated mortgage or deed of trust, without the aid or interposition of this honorable court in chancery sitting; nor can the said trust be executed, as your orators are advised and charge, and the 99 rights of all the parties interested be ascertained and fully protected in the premises otherwise than by a judicial sale of the mortgaged premises, and of all the franchises, property, premises, and appurtenances covered by the said Consolidated Mortgage or deed of trust. Until such sale can be had and the proceeds thereof distributed, your orators are likewise advised and charge that it is expedient and necessary that the franchises, property, premises and appurtenances so mortgaged to your orators in trust as aforesaid, and all the rights, franchises and property of the Railway Company, of whatever name, nature and description, including all its money on hand and the earnings of the same, be placed in the hands and under the control of a receiver or receivers, to be appointed herein by this court, with such proper powers and control over the same as to the court shall seem right and equitable to be conferred.

In consideration whereof, and for as much as your orators are remediless in the premises, by the rules of the common law, and can have adequate relief only in a court of equity, where matters of this nature are properly cognizable and relievable; to the end, therefore, that the said defendants may, if they can, show why your orators should not have the relief hereby prayed, and that they may separately and severally answer, make (but not under oath, their answer under oath being hereby expressly waived), according to the best of their knowledge, information and belief, to all the matters and charges aforesaid, and that as fully in every respect as if the same were here again repeated and they 100 thereunto particularly interrogated that a receiver may be appointed in this cause of all and singular the rights, franchises and property, of every name and nature, of the defendant, the Louisville, New Albany and Chicago Railway Company, with power and authority to operate said railroad and all its connections and carry on the business of the Railway Company under the protection of this court, with all the usual powers and duties of receivers in such cases, and with authority to proceed to recover, by

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suit or otherwise, all property in the hands of other parties belonging to the Railway Company, and all moneys justly due to it and unlawfully withheld by any person on any pretense whatever, that an injunction may issue out of this court, restraining and enjoining the Railway Company and all and every its agents and servants, from in any way interfering with the possession or control of the property of the Railway Company under the control of said receiver, and from selling, transfering, conveying, leasing or otherwise disposing of or incumbering any of the property, rights or franchises of the Railway Company; that all the rights and franchises, and all the property, real and personal, of the Railway Company, may be declared subject to the lien of the said Consolidated Mortgage; that an account may be taken of the number and amount of said bonds outstanding under the said Consolidated Mortgage and the interest due upon the same and on the coupons thereof; that the amount so found due may be found to be the first lien on the property of the Railway Company, according to the terms of the said Consolidated Mortgage or deed of trust, subject only to the superior and prior liens of the said Main Line and
101 Air Line Mortgages above recited; that the said Railway Company may be decreed to pay the amount so found to be due upon the said Consolidated Mortgage bonds and the coupons thereto for interest or principal, or both; that in default thereof, all the property and franchises of the Railway Company may be sold under a decree of this court and according to law and the practice of this court, to satisfy the amount so found due; that out of the proceeds of said sale, or the net earnings while in the hands of said receiver so to be appointed, there may be paid, first, the costs and expenses of your orators in this suit, including proper attorneys' and counsel fees, with proper compensation to your orators for their own services as trustees, to be allowed by the court, and that the residue thereof may be applied to the payment of the amount due upon the said Consolidated Mortgage Bonds and the coupons thereto, with interest thereon; that if there be any surplus, it may be applied in such way as this court may direct; that all the defendants in this suit may be barred of and from any equity of redemption of and in the said property and franchises; and that any deficiency on such sale may be entered in this cause as a judgment against the said Railway Company; and that your orators may have such other and further relief in the premises as the circumstances of the case may require and as may be agreeable to equity; may it please your Honors to grant unto your orators a writ of subpœna issuing out of and under the seal of this court, directed to the defendants, the Louisville, New Albany and

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Chicago Railway Company, The Central Trust Company of New York, James Murdock and John H. Stotsenburg—to appear
102 and answer this bill.

And your orators will ever pray, etc.

The Farmers' Loan and Trust Company,
By R. G. Rolston,
President. (Seal.)

Attest:
E. S. Marston,
Secretary. (Seal.)

Turner, McClure & Rolston,
Solicitors for Complainants.

Herbert B. Turner,
Of Counsel.

United States of America.
Southern District of New York. } ss.

Roswell G. Rolston, being duly sworn, says: That he is the president of The Farmers' Loan and Trust Company, the complainant above named; that he has read the foregoing bill of complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true; that this verification is not made by the said complainant because it is a corporation; that his knowledge is derived from having taken part in the transaction spoken of and from statements made him, and from examination of the papers, and the same constitute his grounds of belief; that the seal affixed to said bill of complaint is the corporate seal of said complainant, and was so affixed by its authority.

R. G. Rolston.

Sworn to before me, this 6 day of November, 1896.

W. B. Cardozo,
Notary Public (18), N. Y. County.

EXHIBIT A.

103 This indenture, made and entered into this first day of January, one thousand eight hundred and eighty-six, by and between the Louisville, New Albany and Chicago Railway Company, hereinafter called the Railway Company, a corporation duly created and existing under the laws of the States of Indiana and Kentucky, party of the first part, and the Farmers' Loan and Trust Company, a corporation duly created and existing under the laws of the State of New York, and John H. Barker, of Michigan City, in the State of Indiana, hereinafter called the trustees, parties of the second part:

Exhibit to

Whereas, The party of the first part owns and is operating a railroad in the State of Indiana, which is composed of a line from New Albany, on the Ohio river, to Michigan City, on Lake Michigan, hereinafter called the Main Line, and a line from Indianapolis to a junction with the Chicago and Western Indiana Railroad, at a point on the State line between Indiana and Illinois, about twenty miles southwest of Chicago, hereinafter called the Air Line, together with certain proprietary and leasehold interests in the franchises and railroad of the said Chicago and Western Indiana Railroad Company, and in the terminal facilities of the said company in the city of Chicago, and certain terminal rights, facilities and approaches in the other cities above mentioned, and in the city of Louisville, in the State of Kentucky, and between said city of Louisville and the City of New York; and,

Whereas, The said railroad is subject to the following liens, that is to say:

104 First. The Main Line is subject to the line of a mortgage made July first, 1880, by the party of the first part to John C. New, of Indianapolis, and Washington C. DePauw, of New Albany, in the State of Indiana, as trustee, to secure three million dollars ($3,000,000) of bonds, bearing date July first, 1880, payable July first, 1910, with interest at the rate of six per cent. per annum.

Second. The Air Line is subject to the lien of a mortgage, made August 10th, 1881, by the party of the first part to John C. New, of Indianapolis, as trustee, to secure two million three hundred thousand dollars ($2,300,000) of bonds, bearing date August xhibit to same 10th, 1881, and payable August first, 1911, with interest at the rate of six per cent. per annum.

Third. The whole road is subject to the lien of a mortgage, made February first, 1883, by the party of the first part, to the Farmers' Loan and Trust Company, of New York, W. M. Lewis, of New Albany, as trustees, to secure one million dollars ($1,000,000) of bonds, bearing date February first, 1883, and payable February first, 1888, with interest at the rate of six per cent. per annum.

Fourth. The whole railroad is subject to the lien of a mortgage, made by the party of the first part, March 24th, 1884, to the Farmers' Loan and Trust Company, and W. M. Lewis, of New Albany, as trustees, to secure three million dollars ($3,000,000) of bonds, bearing date March 24th, 1884, and payable April first, 1914, with interest at the rate of six per cent. per annum.

One million dollars ($1,000,000) of the said last mentioned
105 three million dollars ($3,000,000) of bonds are required by the
terms of the said mortgage, to be delivered to the Farmers' Loan and Trust Company, as trustees, to be exchanged for bonds secured by and under the one million dollar ($1,000,000) mortgage of February first, 1883, above described, and have been so delivered.

Fifth. The whole of the said liens, after making the provision last aforesaid, amount to eight million three hundred thousand dollars ($8,300,000).

Whereas, at a meeting of the Board of Directors of the said Railway Company, duly and legally called and convened, the said board being fully authorized by law so to do, did resolve in substance and effect, for the purpose of providing means to satisfy and discharge the liens aforesaid, and refund the said indebtedness, and to borrow money for the objects of the organization of the said company, that the Railway Company, under its corporate seal, make and issue, from time to time, its certain other bonds and obligations, to the extent of ten million of dollars ($10,000,000), and, thereby, become indebted to divers persons, bodies politic or corporate who shall become holders thereof, the said bonds to be ten thousand in number, numbered consecutively from one to ten thousand inclusive, each of them to be for the sum of one thousand dollars ($1,000), and to bear date

on the first day of January, 1886, and to be payable on the first day of April, 1916, in gold coin of the United States, of the present standard weight and fineness, with interest thereon to be payable on the first day of October, in each year, on presentation of the coupons to be attached thereto, and to be in the form and
106 contain the provisions following, that is to say:

UNITED STATES OF AMERICA,

STATE OF INDIANA.

Louisville, New Albany and Chicago Railway Company.

$1,000. $1,000.

Consolidated Mortgage Bond.

For value received, The Louisville, New Albany and Chicago Railway Company hereby promises to pay to the Farmers' Loan and Trust Company and John H. Barker, Trustees, or bearer, at the company's office, in the City of New York, on the first day of April, which will be in the year one thousad nine hundred and sixteen,

One Thousand Dollars

in United States gold coin, of the present standard weight and fineness, with interest payable in like gold coin, at the rate of six per centum per annum, semi-annually, free of United States Government tax, on the first days of April and October, in each year, until the principal is paid, on the presentation and surrender of the respective coupons hereto annexed, the principal and interest of this bond being payable without relief from valuation or appraisement laws. This bond is one of a series of ten thousand bonds, of like form and tenor, the payment of which is secured by a mortgage, or deed of trust, to the Farmers' Loan and Trust Company and John H. Barker, as trustees, bearing even date herewith and duly recorded, to which mortgage, or deed of trust, and the provisions and conditions thereof, reference is hereby made.
107 This bond shall not become obligatory until the certificate hereon endorsed shall be signed by the Farmers' Loan and Trust Company, Trustee. This bond may be registered at the office of the party of the first part, or at its agency in the City of New York, at the option of the holder, and thereafter, unless at any time registered payable to bearer, will only be payable to such person as on this bond shall appear, from time to time, to be the last duly registered transferee or owner thereof.

xhibit to same

In witness whereof, The Louisville, New Albany and Chicago Railway Company has caused this bond to be signed by its president and secretary, and its corporate seal to be hereto affixed, this first day of January, one thousand eight hundred and eighty-six.

....

President.

....

Secretary.

And, whereas, at the meeting and for the purposes aforesaid, the said board of directors did further resolve, that for the purpose of equally securing all of the said bonds, the Railway Company, under its corporate seal, should make and deliver to the trustees a mortgage, or deed of trust, conveying, assigning and transferring to the trustees in trust, all its railroad and franchises, as hereinafter described, as security for the payment of said bonds, and each and all of them, and the interest to accrue thereon, upon the terms and conditions hereinafter contained, which were and are, by the said board of directors, deemed to be just and equitable.

Now therefore, this indenture witnesseth, that the Louisville,
108 New Albany and Chicago Railway Company, party of the
first part, in consideration of the premises and of one dollar to it in hand paid, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, assigned, set over, released, conveyed and confirmed, and by these presents doth grant, bargain, sell, assign, set over, release, convey, and confirm unto The Farmers' Loan and Trust Company and John H. Barker, parties hereto of the second part, and to survivor of them, and to their successor or successors in the trust herein and hereby created and declared, all the railway of the party of the first part in the City of Louisville, in the State of Kentucky, and extending from New Albany on the Ohio River to Michigan City in the State of Indiana, and from the City of Chicago in the State of Illinois, to the Indiana State line, under a leasehold right, and from said State line to the City of Indianapolis in the State of Indiana, including the railway lying and being in all of said cities, and terminal rights and facilities and approaches thereto, the same being about four hundred and seventy-five miles in length, and running through the counties of Floyd, Clark, Washington, Orange, Lawrence, Monroe, Owen, Putnam, Montgomery, Tippecanoe, White, Pulaski, Stark, Laport, Marion, Hamilton, Boone, Clinton, Carroll, Jasper, Newton and Lake, in said State of Indiana, and Jefferson County in said State of Ken-

Exhibit

tucky, and Cook County in said State of Illinois, and also all
branches thereof, including all the property of every sort or nature
now owned by said Railway Company, and that it may in the
future acquire for the purposes and connected with or ap-
109 pertaining to the railroads or railways above mentioned and
described, together with all the lands, tracks, lines, rails, brid-
ges, ways, buildings, piers, wharves, structures, erections, fences,
walls, fixtures, franchises, privileges and rights of the railway com-
pany, and also all locomotives, engines, tenders, cars, carriages.
tools, machinery, manufactured and unmanufactured materials,
coal, wood, and supplies of every kind, belonging or appertaining
to the railway company, also all the tools, incomes, issues and
profits, arising out of the said property, and all rights to receive
and recover the same, also all estate, right, title and interest of the
party of the first part, in and to any and all real estate belonging to
the said party of the first part, also all leasehold lands, with build-
ings thereon erected; it being the true intent and meaning of these
presents, that the said Railway Company shall and doth convey to
the said trustees, all and all manner of franchises of every kind
and description, however derived and wherever situate, all and all
manner of real estate or interest therein, wherever such real
estate or interest therein, wherever such real estate may be
situate, and all and all manner of personal property, of
whatever nature or description the same may be, at the
date of these presents owned or possessed by the said Rail-
way Company or which may at any time hereafter, during the
continuance of this trust, be acquired by the said Railway Com-
pany for purposes connected with or appertaining to the railroads
or railways above mentioned or described; and also all choses in
action, of every kind and description, including bills receiv-
110 able, book accounts, traffic balances, all books of record, and
all accounts of every kind and description, all papers, maps, in-
ventories, and documents in any wise referring or relating to the
property or franchises hereby conveyed; and also all franchises
and property, and all personal rights or interest in any franchises or
property, of every kind and description, real, personal or mixed,
and wherever the same may be situate that may at any time, be-
fore or after the date of this indenture, be acquired by or for the
said Railway Company, for purposes connected with or appertain-
ing to said railways or railroads; all of which it is hereby coven-
anted shall incur by way of accretion to the benefit and advantage
of said trustees, and by way of further and better security, this
conveyance being made subject to the liens of certain mortgages
heretofore made by the party hereto of the first part, namely: a

hibit to same mortgage dated July first, 1880, made to John C. New and Washington C. DePauw, as trustees, covering a portion of the above described premises; a certain other mortgage, dated August 10, 1881, made to John C. New, trustee, covering another portion of the above described premises; and also a mortgage made by the party of the first part hereto to the parties of the second part hereto, as trustees, dated February first, 1883:

To have and to hold, all and singular, the above described premises to the trustees their and each of their successors or successor, in the trust hereby created, to the only proper use and behoof of the said trustees, their and each of their successors or successor, in trust nevertheless for the uses and purposes hereinafter expressed, namely: 111

First. To secure the payment of the bonds of the said railway company, to be issued as herein recited, and for the use and benefit of the persons, firm or firms, bodies politic or corporate, who shall at any time become the purchasers or holders, owners or bearers, of either or any of the said bonds, subject to the terms, provisions and stipulations in the said bond contained, which bonds, however, shall be equal in priority of lien, at whatever time the same may respectively have been issued.

Second. Until default shall be made in payment of the principal or interest secured by said bonds, or some of them, the railway company shall be permitted to possess, manage, operate and enjoy all and singular the mortgaged premises, with their appurtenances, and to take and use the rents, incomes, profits, and issues thereof, in the same manner and to the same effect as if this indenture had not been made.

Third. In case default in the payment of interest on any of the bonds secured by this indenture shall be made and shall continue for the space of six months, and such payment shall be duly demanded, then the trustees may, and if requested in writing by the holders of the majority of the bonds secured hereby and then outstanding, shall enter upon all and singular the mortgaged premises and every part thereof, and possess, operate, use and enjoy the same; and upon demand in writing being made by the trustees, the railway company shall immediately surrender possession of all and singular the mortgaged premises and property, of every sort and
112 description, to the trustees. It shall also be lawful for the trustees, in case such default shall be made and continue as

aforesaid, and payment be demanded, and in case such request of bondholders be made, as aforesaid, they shall do so, to sell and dispose of all the premises and property, of every sort and description, hereby conveyed, at public auction, in the City of New York, or in Chicago, Illinois, as the trustees may elect (such election, however, being subject to a right on the part of a majority of the bondholders to designate at which of the said two places the sale shall be made), having first given notice of the time and place of such sale, by advertisement published not less than once a week, for three months next preceeding the time specified for the sale, in one or more newspapers published in the City of New York, and in one or more newspapers published in the city of Chicago, Illinois, and to adjourn the said sale from time to time, by announcement at the time and place advertised, without further advertisement, and to make and deliver to the purchaser or purchasers, good and sufficient deed or deeds, in fee simple, which sale being made to the highest bidder, shall be a perpetual bar both at law and in equity, against the railway company and all other persons lawfully claiming the above described premises and property, or any part thereof, or any lien upon or interest in the same, through or from the said railway company, and after deducting from the proceeds of such sale a just allowance for all expenses thereof, including reasonable attorney and counsel fees, and any other necessary expenses incurred by the
113 trustees in executing their trust, including their own reasonable
compensation, to apply the proceeds to the payment of the principal of such of the aforesaid bonds as may be at the time outstanding and unpaid, whether the same shall or shall not have previously become due, and of the interest which shall at that time have accrued on said principal and be unpaid, without discrimination or preference, but ratably to the aggregate amount of such unpaid principal and such accrued and unpaid interest; and if, after satisfaction thereof a surplus shall remain, to pay the same over to the railway company.

Fourth. In case default in the payment of interest on any of the bonds secured by this indenture shall be made and shall continue for the space of six months, and such payment shall be duly demanded, then the trustees, if they shall elect so to do, may, and if requested in writing by the holders of one-half of the bonds secured hereby and then outstanding, shall apply to any court or courts having proper jurisdiction in the premises for a foreclosure of this deed of trust or mortgage, and sale of the mortgaged premises and property, and for the appointment in the meantime of a receiver of the mortgaged premises under this indenture, the trus-

Exhibit to same tees to have the right to nominate and designate the person to be appointed receiver, and, so far as lawfully may be done, to control and direct the general course of the administration of the mortgaged premises by and on the part of such receiver. In the event of such right of foreclosure and sale accruing, for non-pay-
114 ment of interest, immediately thereupon the whole amount of the principal of the bonds secured by this indenture and then outstanding shall, at the option of the trustees, become due and payable, and this provision is expressly declared not to be in the nature of penalty for breach of condition or for the non-payment of interest, but to be a provision which is essentially necessary to carry out the objects and purposes of the parties hereto.

Fifth. If the trustees shall enter upon the mortgaged premises and take possession, control and management thereof under any preceding provision, they shall apply from the mortgaged premises during such possession, in the discharge and satisfaction of interest, or interest and principal, secured by this indenture, as the same may become due and payable and in due order of priority. During such possession, occupation, control and management, the trustees shall only be liable for the exercise of good faith and of reasonable diligence, and all expense, loss and damage of every kind and nature growing out of such possession, control and management shall, to the extent that any liability is incurred thereby, constitute a charge upon the mortgaged premises exclusively. The trustees, during such possession, shall have the right and power to manage the property and premises, and may enter into any and all contracts proper, ordinary and usual in such cases, whether by lease or otherwise, and may charge the same as a lien upon the mortgaged premises or any part thereof, and generally may do and perform such things in the premises as the Railway Company itself might do and perform had it remained in un-
115 disputed posesssion and control of the premises.

Sixth. If a receiver of the mortgaged premises shall be appointed under the provisions of this indenture, all the expenses incident to such appointment, including all his lawful obligations and expenses, shall constitute a lien upon the mortgaged premises to the lien of any of the bonds secured by this indenture. Such receiver shall have power to enter into contracts and obligations, and to do all other things incident to the management of the property and which the Railway Company would have had power to do had it remained in possession of the mortgaged franchises, premises and property. The right of action under this indenture is vested exclusively in the trustees, and under no circumstances shall any bondholders or any number of bondholders have any right to institute an action or other proceeding on or under this indenture for the purpose of enforcing any remedy herein and hereby provided; and all actions and proceedings for the purpose of enforcing the provisions of this indenture shall be instituted and conducted by the trustees according to their sound discretion until the owners and holders of a majority of the bonds secured and then outstanding shall unite in requesting in writing the trustees to do or to refrain from doing some particular act or acts, or to pursue or to refrain from pursuing any particular line of conduct or policy connected with the enforcement of such security, accompanying such request with evidence to the satisfaction of the trustees that they are such actual owners of bonds, and also with satisfactory indemnity to the trustees for all expenses and costs of every kind, and also for all possible claims for damages. **Exhibit to**

116 Seventh. In case of any sale of the premises embraced in this mortgage, under a decree of any court having jurisdiction thereof, based on the foreclosure of this mortgage, or in pursuance of advertisement without such decree as aforesaid, the trustees may, in their discretion, purchase, and they are hereby fully authorized and empowered to purchase the premises, property and franchises embraced herein, for the use and benefit of the holders of the then outstanding bonds secured by this mortgage, and having so purchased the said premises, property and franchises, the right and title thereto shall vest in the trustees, and no bondholder shall have any claim thereto or to the proceeds thereof, except for his *pro rata* share of the proceeds of such purchased premises, property and franchises, as represented in a new company or corporation, to be formed for the use and benefit of the holders of the bonds secured hereby and then outstanding; and the trustees may take such lawful measures as they may deem for the interest of the bondholders to organize or procure the organization of a new company or corporation for the benefit of the holders of the bonds secured by this indenture and then outstanding. The said new company or corporation shall be organized upon such terms, conditions and limitations, and in such manner as the holders of a majority of then outstanding bonds secured by this mortgage shall in writing request or direct; and provision may, if such majority shall so elect, but not otherwise, be made in the organization of such new company for the interests of any or all the holders of junior obligations of the Railway Company, and for its stock-
117 holders and simple contract creditors, or any of them, and the trustees so purchasing shall thereupon convey the premises,

hibit to same property and franchises, so purchased by them, to such new company or corporation.

Eighth. In case it shall become necessary to institute proceedings for the forclosure and sale of the mortgaged premises, or should any such sale take place under the power above set forth, the trustees, shall aid, remote and encourage in all lawful ways any plan for the reorganization of the mortgaged premises and property, suggested for the benefit and advantage of the holders of bonds secured hereby, that they may deem most beneficial for such bondholders; and in case of any such sale the same shall be conducted under the general control and management of the trustees, and the trustees shall receive and distribute the proceeds of sale, except as otherwise provided in and by the plan of reorganization. in pursuance of which such sale may be had—it being understood and agreed that the trustees shall be guided and controlled in all such proceedings by the terms and provisions of any scheme of reorganization which shall receive the assent of the holders of a majority of the bonds secured by this indenture, and then outstanding, and shall be approved by the trustees.

Ninth. The railway company reserves and retains for itself, its successors and assigns, the right to sell, lease and otherwise dispose of, free from the lien of this mortgage or deed of trust, any real or personal property now covered or affected, or here-
118 after to be covered or affected by this mortgage, which may
no longer be required by the railway company for the purposes of its incorporation; provided, however, that the proceeds of such sale, lease or disposition shall be received by the trustees, and be applied by them to the purchase of other property in the name of the railway company, to be subject to the lien hereof, or be applied to the purchase of bonds secured hereby, which said bonds shall be canceled. Any conveyance by the railway company of any such real or personal property, in which the trustees shall join, shall convey the same free and discharged of any lien hereby created, if a recital to such effect shall be contained in such conveyance, but not otherwise; and in case of such recital, this indenture shall, as to the property so conveyed, be thereafter void and of no effect; and no obligation shall be imposed on the purchaser to see to the application of the purchase money.

Tenth. No holder of any bond hereby secured shall have recourse for payment to any stockholder of the railway company, or to any person who has ever been such stockholder, or make any

Exhibit to

demand for the payment of any such bond against any such person, under and in pursuance of any law imposing liability upon any stockholders of incorporated companies, whether such law be now in force or shall hereafter be enacted, or by reason of any cause whatever: and the railway company hereby expressly waives the benefit of any appraisal, stay or exemption law that may now or at any time be in force, and consents that any sale that may be had under the provisions of this mortgage shall be had in the same
119 manner and to the same effect, as if such appraisal, stay or exemption law did not exist.

Eleventh. If the railway company shall well and truly pay the sum of money by the said bonds secured hereby, and the coupons thereto attached, required to be paid by it, which it hereby covenants to do, and shall well and truly keep and perform all the covenants, agreements and undertakings herein and hereby entered into and required to be kept and performed, according to the true intent and meaning of these presents, then, and in that case, the estate, right, title and interest of the trustees in the above described property and premises shall cease, determine and become wholly void.

Twelfth. The trustees shall be under no obligation to recognize any person or persons, firm or corporation, as holder or holders, owner or owners, of one or more of the bonds secured hereby, or to do or refrain from doing, any act pursuant to the request or demand of any person or persons, firm or corporation, professing or claiming to be such holder or holders, until such supposed holder or holders shall produce the said bonds and deposit the same with the Farmers' Loan and Trust Company, and shall also indemnify and save harmless the trustee, to their full satisfaction, from any and all costs, expenses, outlays and counsel fees and other reasonable disbursements for which they may become liable or responsible on proceeding to carry out such request or demand, and for their reasonable and proper compensation in that behalf. Should any suit or other proceeding be brought in any court against the trus-
120 tees under this indenture, or by reason of any matter or thing connected with the trusts hereby created, or the premises affected hereby, the trustees shall thereupon notify the Railway Company of the fact by delivering such notice at the office of the Railway Company; and the trustees shall thereupon be under no obligation to enter an appearance by counsel, or in any way to appear in and defend the said suit or other proceeding until indemnified to their satisfaction for so doing; but they may appear in and defend the

Exhibit to same

same without indemnity if they shall elect so to do, and be compensated therefor from the trust fund. In case at any time it shall be necessary and proper for the trustees to make any investigation respecting any fact or facts, preparatory to taking any action, or doing or not doing anything, as such trustees, the certificate of the president of the Railway Company, under the corporate seal attested by the affidavit of one or more directors of the said corporation, shall be sufficient evidence of such fact or facts to protect the trustees in any action they may take or anything that they may do or refrain from doing, by reason of the supposed existence of such facts.

The trustees shall only be responsible for reasonable diligence in the management of the trust, and shall not be answerable in any case for the act or default of any agent, attorney or employee selected with reasonable discretion. The trustees shall be entitled to be reimbursed all proper outlays of every sort and nature by them incurred in the discharge of this trust, and to receive a reasonable and proper compensation for any duty they may at any time perform in the discharge of the same; and all
121 such fees, commissions, compensations and disbursements shall
constitute a lien on the mortgaged property and premises.

Thirteenth. In case the office of trustee under this indenture shall become vacant by reason of incapacity, removal or resignation of the said parties of the second part, or either of them, or any successor, it shall be lawful for the holders of a majority in amount of the bonds hereby secured and then outstanding, to appoint a successor or successors, by writing by them signed, and upon such appointment being made, and the said trust be in accepted and written notice thereof to said railway company, any such successor or successors, substituted trustee or trustees, shall without further act or deed become vested with all and singular the estate, right and powers, and shall perform all the duties of trustee in like manner and with the same effect as if it, they or he had been named in this instrument, as trustee or trustees.

Fourteenth. The word "trustee," "trustees," or "successors," wherever used in this instrument, shall mean the trustees under this mortgage for the time being, whether original or substituted, with all the powers appertaining to his office or their office.

It is further covenanted and agreed between the parties hereto that eight thousand three hundred of the bonds to be issued under

and secured by the lien of this mortgage representing eight million three hundred thousand dollars ($8,300,000) of principal, shall be executed and delivered to the Farmers' Loan and Trust Company as trustee to be certified and used by the said trustee as fol-
122 lows, that is to say,

Three thousand thereof to be exchanged for bonds representing equal amounts of principal secured by and under the above mentioned mortgage for three million dollars ($3,000,000) upon the Main Line dated July first, 1880;

Twenty-three hundred thereof to be exchanged for bonds representing equal amounts of principal secured by and under the above mentioned mortgage on the Air Line, dated August first, 1881;

One thousand thereof to be exchanged for bonds, representing equal amounts of principal secured by and under the above mentioned mortgage on the whole road for one million dollars ($1,000,000), dated February first, 1883;

Two thousand thereof, to be exchanged for bonds representing equal amounts of principal secured by and under the above mentioned mortgage for three million dollars ($3,000,000), dated March 24th, 1884.

Such exchanges shall be had and conducted under the terms and subject to such conditions as may be agreed upon between the railway company and the Farmers' Loan and Trust Company; and may be made from time to time before or after the maturity of the bonds secured by the said mortgages or any of them.

The one thousand bonds issued under the three million dollars ($3,000,000) mortgage of March 24th, 1884, heretofore delivered to the said Trust Company to be exchanged for a like amount of bonds under the one million dollar ($1,000,000) mortgage of February first, 1883, shall be canceled by the said Trust Company
123 whenever all of the said eight thousand three hundred bonds under this mortgage have been delivered to said Trust Company, and all of the remaining two thousand bonds under the said mortgage of March 24th, 1884, have come into the hands of the said Trust Company by exchange as above provided.

Each of the bonds under any of the said prior mortgages so xhibit to same acquired by exchange, shall be received by the said Farmers' Loan and Trust Company, and shall thereupon be stamped upon the face thereof as payable only to the parties of the second part as Trustees and shall thenceforth be payable only to the said parties of the second part as Trustees, and shall be held by them as collateral security for the payment of all the bonds authorized under such prior mortgage, shall have come into the possession of the said Farmers' Loan and Trust Company.

Whenever all of the bonds authorized under any one of the prior mortgages aforesaid shall have come into the possession of the said Farmers' Loan and Trust Company as Trustees as aforesaid, the same shall be canceled, and the mortgage securing the same shall be discharged of record.

The payment of the interest upon all the bonds issued and outstanding under this mortgage shall be deemed a satisfaction of all the interest accrued at the time of such payment upon the bonds so held by the said Trustees, and no interest shall be payable upon the bonds so held until after default in the payment of interest on the bonds secured by this mortgage.

And it is further Covenanted and Agreed by the Railway Company, that it will well and truly pay the sums of money
124 in the said bonds, and in each and all of them mentioned, together with the semi-annual interest due and to become due thereon, at the time, and in the manner, and at the places specified therein; and further that it will well and truly pay, or cause to be paid, all taxes, charges, rates, levies and assessments imposed, assessed or levied or which hereafter may be imposed, assessed or levied upon the premises and property hereby mortgaged, conveyed and assigned, or intended so to be, or any part thereof, and shall and will, at its own proper cost, expense and charge, do, or cause to be done, all acts and things necessary and proper to be done, or performed, in order to preserve and keep valid and intact this lien or encumbrance upon all and singular the property and premises above described.

And it is further Covenanted and Agreed by the Railway Company, to and with the Trustees, that it will from time to time, and at all times upon reasonable request, make, execute, acknowledge and deliver, at its own expense, all such further acts, deeds, conveyances and assurances in law for the better assuring unto the Trustees, upon the trusts and for the purposes herein expressed or intended,

Exhibit to s

all and singular the property of every sort and description hereby mortgaged or conveyed in trust, or appearing, purporting to be, now owned or possessed by or vested in the said Railway Company, or that may hereafter be owned, possessed, acquired or vested in the Railway Company, as by the Trustees or their counsel learned in the law shall be reasonably devised, or advised or required.

125 In testimony whereof, the corporations, parties hereto, have caused their respective corporate seals to be hereto affixed, and the same to be duly attested, and the said John H. Barker hath hereunto set his hand and seal, the day and year first above written.

LOUISVILLE, NEW ALBANY & CHICAGO
RAILWAY COMPANY,
By WILLIAM DOWD,
President.

Attest:
WILLIAM DULLES,
Ass't Secretary.

[L. S].

THE FARMERS' LOAN AND TRUST COMPANY,
By R. G. ROLSTON,
President.

Attest:
WM. H. LEUPP,
Secretary.

JOHN H. BARKER (L. S.)

STATE OF NEW YORK,
CITY AND COUNTY OF NEW YORK. } ss.

Be it remembered, that on this eighth day of January, A. D. 1886, before me, a commissioner of deeds for the States of Indiana and Kentucky, and Illinois, residing in said State, city and county aforesaid, personally appeared William Dowd, President of the Louisville, New Albany and Chicago Railroad Company, personally known to me to be the president of said company, and personally known to me to be the real person, whose name is subscribed to the foregoing instrument, and acknowledged that he, in behalf of said Railway Company, and by authority of its board of directors, had signed and delivered the said instrument, as the free and voluntary act, of the said Railway Company for the uses and purposes therein set forth; also personally appeared before me
126 at the same time William Dulles, Jr., Assistant Secretary of the said Railway Company, personally known to me to be

Exhibit to same

such assistant secretary, and personally known to me to be the real person whose name is subscribed to the foregoing instrument, and acknowledged that he, on behalf of said Railway Company, and by like authority had signed the said instrument, and affixed thereto the official corporate seal of said Railway Company, as the free and voluntary act of the said Louisville, New Albany and Chicago Railway Company for the uses and purposes therein set forth, that he knew the corporate seal so affixed, is said corporate seal.

And also at the same time before me personally came Roswell G. Rolston, President of the Farmers' Loan and Trust Company, personally known to me to be the president of said company, and personally known to me to be the real person whose name is subscribed to the foregoing instrument, and acknowledged that he, in behalf of said trust company, and by authority of its board of directors, had signed and delivered the said instrument as the free and voluntary act of the said Trust Company, for the uses and purposes therein set forth; also personally appeared before me at the same time, William H. Leupp, Secretary of the said Trust Company, personally known to me to be the secretary of said company, and personally known to me to be the real person whose name is subscribed to the foregoing instrument, and acknowledged that he, on behalf of said Trust Company, and by like authority had signed
the said instrument and affixed thereto the official seal of said
127 Trust Company as the free and voluntary act of the said
Farmers' Loan and Trust Company for the uses and purposes
therein set forth; that he knew the corporate seal of said company, and that the seal so affixed is said corporate seal.

And I further certify that this instrument of writing from the Louisville, New Albany and Chicago Railroad Company to the Farmers' Loan and Trust Company, and John H. Barker, Trustees, was at the time and place first above mentioned, produced to me by the president and the secretary of the said Railway Company and acknowledged as aforesaid.

In witness whereof, I have hereunto set my hand, and affixed my official seal, this eighth day of January, 1886.

[L. S.]

CHARLES NETTLETON.
Commissioner for State of Indiana in New York.
CHARLES NETTLETON.
Commissioner for State of Kentucky in New York.
CHARLES NETTLETON,
Commissioner for State of Illinois in New York.

STATE OF INDIANA, }
COUNTY OF LA PORT. } ss.

Exhibit t

Be it remembered, that on the 11th day of January, A. D. 1886, before me, Jared H. Orr, Notary Public, duly commissioned and qualified, personally appeared John H. Barker, to me personally known to be the real individual described in, and who executed the foregoing instrument, and acknowledged that he had executed the same as his voluntary act and deed.

Witness my hand and official seal, at Michigan City, Ind., this 11th day of January, A. D. 11th day of January, A. D. 1886.

JARED H. ORR,
Notary Public.

[L. S.]

STATE OF INDIANA, }
COUNTY OF FLOYD. } ss.

128 The foregoing instrument was filed for record in the recorder's office of Floyd County, on the 14th day of January, A. D. 1886, at seven o'clock in the afternoon of that day, and duly recorded in Book Fifteen of Mortgages on page 317 and following.

[L. S.]

CHARLES SCHMONTZEL,
Recorder of Floyd County.

STATE OF INDIANA, }
COUNTY OF CLARK. } ss.

The foregoing instrument was filed for record in the recorder's office of Clark County, on the 16th day of January, A .D. 1886, at fifty minutes past one o'clock in the afternoon of that day, and duly recorded in Book Fifteen of Mortgages on page 423 and following.

[L. S.]

EVAN SHELBY,
Recorder of Clark County.

STATE OF INDIANA, }
COUNTY OF WASHINGTON. } ss.

The foregoing instrument was filed for record in the recorder's office of Washington County, on the 14th day of January, A.

it to same D. 1886, at five o'clock in the afternoon in Book F of Mortgages on page 507 and following.

[L. S.]

PRESTON BRYAN.
Recorder of Washington County.

BY J. V. HAMILTON,
Deputy.

STATE OF INDIANA,
COUNTY OF ORANGE. } ss.

129 The foregoing instrument was filed for record in the recorder's office of Orange County, on the 14th day of January, A. D. 1886, at six o'clock in the afternoon of that day, and duly recorded in Book Seven of Mortgages on page 300 and following.

WILLIAM W. WORRELL,
[L. S.] Recorder of Orange County.

STATE OF INDIANA,
COUNTY OF LAWRENCE. } ss.

The foregoing instrument was filed for record in the recorder's office of Lawrence County, on the 14th day of January, A. D. 1886, at half-past two o'clock in the afternoon of that day, and duly recorded in Book Eleven of Mortgages on page 3.

JAMES A. MCPHERTERS.
[L. S.] Recorder of Lawrence County.

STATE OF INDIANA,
COUNTY OF MONROE. }

The foregoing instrument was filed for record in the recorder's office of Monroe County, on the 14th day of January, A. D. 1886, at one o'clock in the afternoon of that day, and duly recorded in Book F of Mortgages on page 504 and following.

W. N. HALL,
[L. S.] Recorder of Monroe County.

STATE OF INDIANA,
COUNTY OF OWEN. } ss.

The foregoing instrument was filed for record in the recorder's
130 office of Owen County, on the 15th day of January, A. D.

1886, at forty-five minutes past nine o'clock in the forenoon of that day, and duly recorded in Book M of Mortgages on page 54 and following. Exhibit to

FRANK STALEY,
[L. S.] Recorder of Owen County.

STATE OF INDIANA, }
COUNTY OF PUTNAM, } ss.

The foregoing instrument was filed for record in the recorder's office of Putnam County, on the 14th day of January, A. D. 1886, at eleven o'clock in the afternoon of that day, and duly recorded in Book Eight of Mortgages on page.

DANIEL MALLONEY,
[L. S.] Recorder of Putnam County.

STATE OF INDIANA, }
COUNTY OF MONTGOMERY. } ss.

The foregoing instrument was filed for record in the recorder's office of Montgomery County, on the 14th day of January, A. D. 1886, at eleven o'clock in the forenoon of the day, and duly recorded in Book Twenty-five of Mortgages on page.

JOHN JOHNSON,
[L. S.] Recorder of Montgomery County.

STATE OF INDIANA, }
COUNTY OF TIPPECANOE. } ss.

The foregoing instrument was filed for record in the record-
131 er's office of Tippecanoe County, on the 18th day of January, A. D. 1886, at eight o'clock in the forenoon of that day, and duly recorded in Book Thirty-seven of Mortgages on page 168 and following.

DAVID BRYAN.
(L. S.) Recorder of Tippecanoe County.
HENRY L. BRAYN,
Deputy.

STATE OF INDIANA, }
COUNTY OF WHITE. } ss.

The foregoing instrument was filed for record in the record-

Exhibit to same er's office of White County, on the 13th day of January, A. D. 1886, at ten o'clock in the forenoon of that day, and duly recorded in Book Twenty-five of Mortgages on page 194 and following.

JAMES P. SIMONS,
[L. S.] Recorder of White County.

STATE OF INDIANA, }
COUNTY OF PULASKI. } ss.

The foregoing instrument was filed for record in the recorder's office of Pulaski County, on the 15th day of January, A. D. 1886, at forty minutes past three o'clock in the afternoon of that day, and duly recorded in Book P of Mortgages on page 191 and following.

J. M. STEIS,
[L. S.] Recorder of Pulaski County.

STATE OF INDIANA, }
COUNTY OF STARK. } ss.

The foregoing instrument was filed for record in the record-
132 er's office of Stark County, on the 16th day of January, A.
D. 1886, at twenty minutes past eleven o'clock in the forenoon of that day, and duly recorded in Book H of Mortgages on page 350 and following.

JACOB BOZARTCH,
[L. S.] Recorder of Stark County.

STATE OF INDIANA, }
COUNTY OF LAPORTE. } ss.

The foregoing instrument was filed for record in the recorder's office of Laporte County, on the 18th day of January, A. D 1886, at five o'clock in the afternoon of that day, and duly recorded in Book 18 of Mortgages on page 348 and following.

D. J. MCMURRY,
[L. S.] Recorder of Laporte County.

STATE OF INDIANA, }
COUNTY OF MARION. }

The foregoing instrument was filed for record in the record-

Exhibit to

er's office of Marion County, on the 13th day of January, A. D. 1886, at five o'clock in the afternoon of that day, and duly recorded in Book 143 of Mortgages on page....

WILLIAM F. KEAY,
[L. S.] Recorder of Marion County.

STATE OF INDIANA,
COUNTY OF HAMILTON. } ss.

The foregoing instrument was filed for record in the recorder's office of Hamilton County, on the 13th day of January, A. D. 1886, at nine o'clock in the forenoon of that day, and duly recorded in Book Q of Mortgages on page 189 and following.

J. P. WHEELER,
[L. S.] Recorder of Hamilton County.

STATE OF INDIANA,
COUNTY OF BOON. } ss.

133 The foregoing instrument was filed for record in the recorder's office of Boone County, on the 13th day of January, A.D. 1886, at fifty-seven minutes past one o'clock in the afternoon of that day, and duly recorded in Book Twenty-four of Mortgages on page 100 and following.

DAVID W. CAMPBELL,
[L. S.] Recorder of Boone County.

STATE OF INDIANA,
COUNTY OF CLINTON. } ss.

The foregoing instrument was filed for record in the recorder's office of Clinton County, on the 13th day of January, A. D. 1886, at fifty minutes past two o'clock in the afternoon of that day, and duly recorded in Book Eighty-seven of Mortgages on page 5.

F. A. HEDGCOCK,
[L. S.] Recorder of Clinton County.

STATE OF INDIANA.
COUNTY OF CARROLL. } ss.

The foregoing instrument was filed for record in the record-

hibit to same er's office of Carroll County, on the 13th day of January, A. D. 1886, at twenty minutes past ten o'clock in the forenoon of that day, and duly recorded in Book One of Mortgages on page 154.

[L. S.] GEO. W. BEALE.
134 Recorder of Carroll County.

STATE OF INDIANA, }
COUNTY OF JASPER. }

The foregoing instrument was filed for record in the recorder's office of Jasper County, on the 12th day of January, A. D. 1886, at fifteen minutes past eleven o'clock in the forenoon of that day, and duly recorded in Book Fifteen of Mortgages on page 162.

THOMAS ANTRIM,
[L. S.] Recorder of Jasper County.

STATE OF INDIANA, }
COUNTY OF NEWTON. }

The foregoing instrument was filed for record in the recorder's office of Newton County, on the 14th day of January, A. D. 1886, at fifty minutes past four o'clock in the afternoon of that day, and duly recorded in Book No. 19 of Mortgages on page 26 and following.

ELISHA PARSONS,
[L. S.] Recorder of Newton County.

STATE OF INDIANA, } ss.
COUNTY OF LAKE. }

The foregoing instrument was filed for record in the recorder's office of Lake County, on the 13th day of January, A. D. 1886, at ten o'clock and ten minutes in the forenoon of that day, and duly recorded in Book Seventeen of Mortgages on page 1 and following.

[L. S.] EDWARD P. AMES.
135 Recorder of Lake County.

STATE OF INDIANA. } ss.
COUNTY OF JEFFERSON. }

The foregoing instrument was filed for record in the record-

Exhibit B to sa

er's office of Jefferson County, on the 15th day of January, A. D. 1886, at thirty minutes past nine o'clock in the forenoon of that day, and duly recorded in Book 288 of Mortgages on page 248 and following.

GEO. K. WEBB,
[L. S.] Recorder of Jefferson County.

EXHIBIT B.

Memorandum of Agreement, made and entered into this 18th day of May, 1886, by and between the Louisville, New Albany & Chicago Railway Company, hereinafter called the Railway Company, a corporation duly organized and existing under the laws of the States of Indiana and Kentucky, party of the first part, and the Farmers' Loan and Trust Company, a corporation duly organized and existing under the laws of the State of New York, and John H. Barker, of Michigan City, in the State of Indiana, trustees, and hereinafter called the Trustees, parties of the second part.

Whereas, on the first day of January, 1886, the parties hereto made and entered into a certain indenture of mortgage, hereinafter called the Consolidated Mortgage, wherein and whereby the Railway Company conveyed to the Trustees its railroads, franchises and other property connected with and appertaining to such
136 railroads by way of mortgage, to secure the payment of the
principal and interest of $10,000,000 of bonds, to be made and issued by the Railway Company, which bonds are hereinafter styled the Consolidated Bonds.

And whereas, the Railway Company owns certain shares of the capital stock of the Chicago & Western Indiana Railroad Company, and of the Belt Railway Company of Chicago, and certain shares of the capital stock of the Bedford & Bloomfield Company, and contemplates acquiring stocks and bonds of branch roads, railroads and extensions by use of the proceeds of said consolidated bonds, or some of them.

And whereas, at a meeting of the Board of Directors of the Railway Company, duly and legally called and convened, the said board being fully authorized by law so to do, did resolve, in substance and effect, for the purpose of creating additional security

Exhibit B to same.

for the payment of the principal and interest of all of the said bonds, that the Railway Company should execute and deliver to the trustees a collateral trust agreement, binding the said company to deposit and pledge with the said Farmers' Loan and Trust Company as additional security for the said $10,000,000 of consolidated bonds, the stocks and bonds hereinbefore described, reserving, however, from such deposit and pledge, such amounts of stock as it might be necessary to keep outstanding in different hands for the purpose of maintaining the organization of any of the companies the stock of which is deposited.

Now therefore, this agreement witnesseth, that the Louisville, 137 New Albany & Chicago Railway Company, party of the first part, in consideration of the premises and of one dollar to it in hand paid at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the parties of the second part forever released and discharged therefrom, doth covenant and agree that it will, as soon as may be practicable, deposit and pledge with the said Farmers' Loan and Trust Company:

1. The ten thousand (10,000) shares of the capital stock of the Chicago & Western Indiana Railroad Company, now owned by the party of the first part.

2. The four hundred (400) shares of the capital stock of the Belt Railway Company of Chicago, now owned by the party of the first part.

3. The twelve thousand (12,000) shares of the capital stock of the Bedford & Bloomfield Company, now owned by the party of the first part.

4. Any and all other stocks or bonds of branch roads, railroads or extensions, which may be hereafter acquired by the Railway Company by use of any of the said consolidated bonds or the proceeds thereof, reserving and retaining, however, from such deposit and pledge in respect of each company the stock of which is deposited and pledged, such amount of stock as it may be necessary to keep outstanding in different hands for the purpose of maintaining the organization of such company.

And the Railway Company doth further hereby covenant and 138 agree, that for the purpose of giving effect to such deposit and pledge, and to carry out the intent and object of this agreement, it will, at or prior to the deposit and pledge herein contemplated, execute full and sufficient instruments, or cause to be executed by the person or persons in whose names the stocks and bonds, which are to be deposited and pledged as aforesaid, may stand, full and sufficient instruments of assignment and transfer of said stock and bonds to the said Farmers' Loan and Trust Company trustee, which instruments of assignment and transfer shall also severally contain a power of attorney, fully authorizing the Farmers' Loan aad Trust Company to transfer to itself as trustees, on the books of the Company to whose stock or bonds the assignment or transfer relates, the stock or bonds covered by such instrument of assignment or transfer.

It is further hereby mutually covenanted and agreed, that the stocks and bonds which shall be deposited and pledged as herein provided, shall be held by the Farmers' Loan and Trust Company, trustee, and its successor or successors in trust, for the uses and purposes herein expressed, that is to say:

First. To secure the payment of the principal and interest of all the said consolidated bonds, and for the use and benefit of the person or persons, firm or firms, body or bodies politic or corporate, who shall at any time become purchasers or holders, owners, or bearers, of either or any of the said bonds, and subject to the terms, provisions and stipulations in the said bonds contained.

Second. Until default shall be made in the payment of the 139 principal or interest secured by said consolidated bonds, or some of them, the voting power appertaining to the stocks and bonds which shall be deposited and pledged as herein provided, as herein provided, shall be exercised in such manner as the Railway Company shall prescribe in writing, and all dividends and interest which shall be paid on such stocks and bonds shall be paid on such stocks and bonds shall be paid on such stocks and bonds shall be paid to the Railway Company, to be enjoyed and applied by it as a portion of its revenue.

Third. In case a default in the payment of interest on any of said consolidated bonds shall be made, and shall continue for the space of six months, then, in that event, the stocks and bonds which shall be deposited and pledged as herein provided, shall be deemed to be part and parcel of the property described in and intended to be covered by the said consolidated mortgage of January 1st, 1886, and all provisions of said mortgage which apply in such case of de-xhibit B to same.

fault to the property therein described and referred to shall apply to the stocks and bonds which shall be deposited and pledged as aforesaid.

Fourth. Except as herein otherwise expressly provided, the rights, duties and liabilities of the parties hereto and of the holders of said consolidated bonds with reference to the stocks and bonds, which shall be deposited and pledged as herein provided shall be the same as is provided in said consolidated mortgage of Janu-
ary 1st, 1886, with reference to the property covered by said
140 mortgage, and at any time before default the railway com-
pany may exercise the right to sell, lease or otherwise dispose of said stocks and bonds which is defined in the ninth subdivision of the Habendum clause of said consolidated mortgage, subject to the conditions and restrictions therein expressed.

In testimony whereof, the corporations, parties hereto, have caused their respective corporate seals to be hereto affixed and the same to be duly attested, and the said John H. Barker has hereunto set his hand and seal the day and year first above written.

(Signed) LOUISVILLE, NEW ALBANY AND
CHICAGO RAILWAY COMPANY,
By WM. DOWD,
President.

Attest:
WM. DULLES, JR.,
[SEAL] Assistant Secretary.

THE FARMERS' LOAN AND TRUST COMPANY,
(Signed) By R. G. ROLSTON,
President.

Attest:
WM. H. LEUPP,
[SEAL] Sec'y.

(Signed) JOHN H. BARKER. (Seal)

STATE OF NEW YORK,
CITY AND COUNTY OF NEW YORK. } SS.

Be it remembered. that on this 18th day of May, A. D. 1886, before me, a Commissioner of Deeds for the States of Indiana, Kentucky and Illinois, residing in said State, city and county aforesaid, personally appeared William Dowd, President of the Louisville, New Albany and Chicago Railroad

Company, personally known to me to be the President of said 141 company, and personally known to me to be the real person whose name is subscribed to the foregoing instrument, and acknowledged that he in behalf of said Railway Company, and by authority of its Board of Directors, had signed and delivered the said instrument, as the free and voluntary act of the said Railway Company, for the uses and purposes therein set forth; also personally appeared before me at the same time, William Dulles, Jr., assistant secretary of the said Railway Company, personally known to me to be such assistant secretary, and personally known to me to be the real person whose name is subscribed to the foregoing instrument, and acknowledged that he, on behalf of said Railway Company, and by like authority had signed the said instrument, and affixed thereto the official corporate seal of said Railway Company, as the free and voluntary act of the said Louisville, New Albany and Chicago Railway Company, for the uses and purposes therein set forth; that he knew the corporate seal of said company, and that the seal so affixed, is said company, and that the seal so affixed, is said corporate seal.

And also at the same time before me personally came Roswell G. Rolston, president of the Farmers' Loan and Trust Company, and personally known to me to be the president of said company, and personally known to me to be the real person whose name is subscribed to the foregoing instrument, and acknowledged that he, in behalf of said Trust Company, and by authority of its Board of Directors, had signed and delivered the said instrument as the free and voluntary act of the said Trust Company, for the uses and purposes therein set forth; also personally appeared before me at the same time, William H. Leupp, secretary of the said Trust 142 Company, personally known to me to be the secretary of said company, and personally known to me to be the real person whose name is subscribed to the foregoing instrument, and acknowledged that he, on behalf of said Trust Company, and by like authority had signed the said instrument, and affixed thereto the official seal of said Trust Company, as the free and voluntary act of the said Farmers' Loan and Trust Company for the uses and purposes therein set forth; that he knew the corporate seal of said company, and that the seal so affixed is said corporate seal.

And I further certify that this instrument of writing from the Louisville, New Albany and Chicago Railroad Company to the Farmers' Loan and Trust Company and John H. Barker, trustees, was at the time and place first above mentioned produced to me by

Exhibit B to same. the president and secretary of the said Railway Company and acknowledged as aforesaid.

In witness whereof, I have hereunto set my hand and affixed my official seal this 18th day of May, 1886.

CHARLES NETTLETON,
[SEAL] Commissioner for Indiana in New York.
CHARLES NETTLETON,
[SEAL] Commissioner for Kentucky in New York.
CHARLES NETTLETON,
[SEAL] Commissioner for Illinois in New York.

STATE OF INDIANA, }
COUNTY OF LAPORTE. } ss.

Be it remembered, that on the 4th day of June, A. D. 1886, before me, Jared H. Orr, Notary Public, duly commissioned
143 and qualified, personally appeared John H. Barker to me personally known to be the real individual described in, and who executed the forgoing instrument, and acknowledged that he executed the same as his voluntary act and deed.

Witness my hand and official seal at Michigan City, Ind., this 4th day of June, A. D. 1886.

JARED H. ORR,
[SEAL] Notary Public.

And now come the defendants the Central Trust Company of New York, and James Murdock, by Butler, Notman, Joline & Mynderse, their solicitors, and enter their appearance herein.

And afterwards at the same time, on said 12 day of November, 1896, before Honorable William A. Woods, judge of said court, the following further proceedings in the above entitled cause were had, to-wit:

And now, on this 12th day of November, 1896, come the parties hereto, and thereupon, upon consent of the solicitors for the several parties, it is

Order cons dating sev causes.

Ordered, that the above entitled cause be and the same is hereby consolidated with the suit now pending in this court, wherein Central Trust Company of New York and John H. Stotsenburg are complainants, and Louisville, New Albany & Chicago Railway Company and others are defendants, and also with the suit now pending in this court wherein the Farmers' Loan and Trust Company and John H. Barker are complainants, and said Louisville, New Albany & Chicago Railway Company and others are defendants, the same to proceed under the title of Farmers' Loan and
Trust Co. of New York and John H. Barker, complainants,
144 against Louisville, New Albany and Chicago Railway
Company.

And at the same time, on said 12th day of November, 1896, before Honorable William A. Woods, judge of said court, the following further proceedings in cause No. 9400 were had, to-wit:

And now, on this 12th day of November, 1896, come the parties hereto, and thereupon, upon consent of the solicitors for the several parties, it is

Ordered, that the above entitled cause be, and the same is hereby consolidated with the suit now pending in this court, wherein John T. Mills, Jr., is complainant, and Louisville, New Albany & Chicago Railway Company is defendant, and also with the suit now pending in this court wherein the Farmers' Loan and Trust Company and John H. Barker are complainants, and said Louisville, New Albany & Chicago Railway Company and others are defendants, the same to proceed under the title of Farmers' Loan and Trust Company of New York and John H. Barker, complainants, against Louisville, New Albany and Chicago Railway Company, and others.

145 And at the same time, on said 12th day of November, 1896,
before the Honorable William A. Woods, Judge of said court, the following further proceedings in the above entitled cause were had, to-wit: Upon reading and filing the verified bill of complaint herein, and on motion of Turner, McClure & Rolston, counsel for

the complainants, and Butler, Notman, Joline and Mynderse, appearing for the Central Trust Company of New York and Murdock and Stotsenburg; and G. W. Kretzenger appearing for the defendant, the Louisville, New Albany & Chicago Railway Company; and E. C. Field for W. H. McDoel, Receiver, and due deliberation having been had,

rder extend-
g appoint-
ent of receiv-
r to consolida-
d causes.

It is ordered, adjudged and decreed, that William H. McDoel who has heretofore in the suit of John T. Mills, Jr., against the Louisville, New Albany and Chicago Railway Company been appointed receiver for the said defendant, the Louisville, New Albany and Chicago Railway Company, be and he is hereby appointed such receiver in the above entitled cause of the said defendant, the Louisville, New Albany and Chicago Railway Company, and of the property of said defendant as set forth in the order appointing him, as made in said cause and entered on the 24th day of August, 1896, to which reference is hereby made, with all the rights, powers and privileges as in said order set forth, and said receivership is hereby extended to this cause.

146 And it is further ordered, that said cause of John T. Mills, Jr., against the Louisville, New Albany and Chicago Railway Company and a certain other cause now pending in this court wherein the Central Trust Company of New York and another are complainants, and the defendants herein, The Louisville, New Albany & Chicago Railway Company and others are defendants, be and the same are hereby consolidated with this cause, and the orders and proceedings had therein are hereby made the orders and proceedings in this cause, the consolidated cause as above recited and set forth.

And afterwards, to-wit: at the November term of said court on the 24 day of November, 1896, before the Honorable William A. Woods, Judge of said court, the following further proceedings in the above entitled cause were had, to-wit:

Petition of
ceiver for n
bridges, &c.

Now comes William H. McDoel, Receiver, appointed in the above entitled cause and presents his petition praying for an order to construct new bridges; to repair freight cars and engines; to ballast and make new alignment of track,and to equip engines and cars with air brakes and automatic couplers; and after reading said petition and being duly advised, it is

Order on sa

Ordered that said receiver be and he is hereby authorized, upon the conditions herein after mentioned, to change the alignment of said railroad north of Lowell; also to reduce the grade north of Cedar Lake from fifty-three (53) feet to twenty-six (26) feet per mile for a distance of one and three-fourths miles; and to reduce the grades at different points between Lowell and Indianapolis, Indiana, on said line of railroad where the same may 147 be found necessary for the economical management of said railroad and to complete the ballasting of said railroad between Hammond and Indianapolis, Indiana; and to complete the ballasting of said road between Campbellsburg and New Albany, Indiana, the uncompleted portion being about twenty-seven (27) miles; also to complete the ballasting on said road between Campbellsburg and Lafayette, Indiana, the uncompleted portion thereof being about seventy-five (75) miles.

And said receiver is further ordered and directed upon the conditions following, to construct seven (7) new bridges, as prayed in said petition; and also to make necessary repairs on freight cars and engines therein described; and to equip the cars on said road with New York air brakes and automatic couplers under the terms and conditions of the contract set forth in said petition,which he is authorized to ratify and affirm, and in compliance with the Act of Congress requiring said appliances to be completed on or before the first day of January, 1898.

And it appearing to the court that said improvements cannot be made and the expense thereof met, out of the present earnings of said road, and it further appearing that the receiver can borrow two hundred thousand dollars ($200,000) on his note or notes as such receiver for the purpose of prosecuting said work, and that said sum will be sufficient to carry on said work for the present in the most economical manner. and that said money can be borrowed without interfering with or affecting the existing liens under the different trust deeds upon the corpus of said railroad securing 148 bonds issued thereunder, and without interfering or affecting existing liens of any other character or kind.

rder on same.

It is therefore ordered that the receiver be and he is hereby authorized to borrow two hundred thousand dollars ($200,000) on his note as such receiver, at a rate of interest not exceeding six per cent. and providing therein that the same shall be paid out of the future earnings of the road, and providing also that such loans in no manner interfere with or effect existing liens upon the corpus of the railroad, and upon obtaining said money as herein provided, said receiver is authorized to exercise his discretion in the time and manner of prosecuting said work and the expenditure of said amount of two hundred thousand dollars ($200,000) thereof.

Said petition is in the words following, to-wit:

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

149 Before Honorable WILLIAM A. WOODS, Judge:

The Farmers' Loan and Trust Company, et al.,
vs.
Louisville, New Albany & Chicago Railway Company, et al.
} In Chancery.
No.

etition.

William H. McDoel, receiver in the above entitled cause, represents to the court that there are four distinctive classes of improvements and betterments upon the property requiring the expenditure of a large sum of money; namely:

1. The Construction of New Bridges.

2. The Repair of Freight Cars and Engines.

3. Ballasting and Making New Alignment of Track.

4. The Equipment of Engines and Cars with Air Brakes and Automatic Couplers.

Construction of New Bridges.

Your petitioner represents that it is necessary to build seven (7) new bridges on the line of said road, to-wit:

One new deck truss bridge over Racoon Creek, one-half mile south of Ladoga. The present bridge is a Howe Truss, 127 **Petition.** feet in length and was built in 1878, and said deck truss bridge will cost approximately $5,000.

150 One bridge of two deck steel girder spans, with one centre pier over Deer Creek, one half mile south of Putnamville; that the present bridge is a Howe Truss and is 117 feet in length and was built in 1876; that the cost of building said new bridge is approximately $4,660.00.

One steel plate girder bridge, fifty-five feet in length over Jack's Defeat Creek at Stinesville; that the present bridge is a Howe Truss and was built in 1876; that the approximate cost of said new bridge is $1,625.00.

One through steel pin connected truss bridge, over North Salt Creek, and

One bridge of like character over South Salt Creek, situate just north of Bedford; that the present bridges over said creeks are Howe Truss bridges and were built in 1878; that said two bridges will cost approximately $18,820.

One lattice girder bridge, one hundred and six feet in length over Blue River, one half mile south of Pekin; that the present bridge is a Howe Truss and was built in 1879; that the said new bridge will cost approximately $4,010.

One lattice girder bridge, 103 feet in length over Muddy Fork Creek near Bridgeport; that the present bridge over said creek is a Howe Truss and was built in 1878; that the new bridge will cost approximately $3,905.

Repair of Freight Cars and Engines.

Your receiver further represents that he has between 500 and 600 freight cars now out of service on account of their bad 151 condition; that it is not safe to use them in their present condition and that it is necessary before using them that they be put in the shops and overhauled and repaired, and that the probable expense of putting them in roadworthy condition will be forty-three thousand seven hundred and twenty dollars ($43,720); that when so repaired they will be valuable to said road and their use will be etition.

a necessity in transporting the spring and summer business of 1897 and that without them it will be impossible to do business which will then be offered.

Your petitioner further represents that there are a large number of engines needing heavy repairs, and when repaired they will make efficient and desirable engines capable of doing the work of new engines and that the use of all of these engines will be necessary to transact the business of said road as early as the spring of 1897; that the probable expense of putting them in roadworthy condition will be fifty thousand dollars ($50,000): that your receiver has valuable machine shops recently constructed at La Fayette, Indiana, and well equipped with modern machinery and appliances for doing all of said desired work and that the expense of repairing them will be greatly reduced if the work thereon can be prosecuted from now until the spring of 1897.

Ballasting and Making New Alignment of Track.

Your receiver further represents that north of Lowell, in Lake County, Indiana, there is a very bad alignment of track, consisting of four very bad curves, and all within a limit of three-fourths of a mile; that on account thereof large expense is involved in
152 maintaining said track and the running of trains over the same
is constantly delayed and thereby the expense of operation is greatly increased, and your receiver further represents that along the above described part of said line of railroad there are also three pile bridges, aggregating two hundred and eighty-two feet in length, which should be taken out and in the opinion of your receiver the same can be taken out and the water way changed without damage to any one and without interfering with the free flow of the water therein and a solid grade substituted in place of said pile bridges; that the approximate cost of making a proper and safe alignment of said track and the removal of said pile bridges and the construction of a new solid enbankment of earth in place thereof will be seven thousand one hundred and twenty-seven and 50/100 dollars ($7,127.50).

And your receiver further represents that north of Cedar Lake it is necessary to change the line and reduce the grade from 53 feet to 26 feet per mile, for the distance of one and three-fourths miles and that the approximate cost of such work will be $16,975, and that from Lowell, Indiana, to Indianapolis, Indiana, it is necessary to reduce the grades at different points and make changes in the alignment, which would cost approximately fifty thousand dollars ($50,000). Petition.

And your receiver further represents that the line of railroad between Hammond and Indianapolis has never been but partially ballasted; that before the receivership herein a large amount of ballast work on said line was contemplated and since your receiver's appointment a considerable amount of ballasting has been done, that it is necessary that said ballasting on said line be prosecuted to
153 completion at as early a date as possible; that on said line the
competition with other lines of railroad between Chicago, Indianapolis and Cincinnati, makes it absolutely necessary to run the passenger trains on said line between said competing points at a high rate of speed and the effect thereof is to cause the rails to become surface bent, and if continued to be used in the present condition of the track will ultimately require the re-rolling of the rails or replacement with new ones; that if the roadbed is properly ballasted the track will be made safe for business and the present rails thereon will constitute a perfectly safe and roadworthy track, and that the estimated cost thereof is fifty thousand dollars ($50,000).

Your receiver further represents that the railroad company in 1895 established a stone crushing machine and plant at Salem, Indiana, at a very large expense, for the purpose of crushing stone for ballast; that said plant is in good order and capable of crushing fifty car loads per day; that at said place the stone is especially adapted for ballast and said company prior to your receiver's appointment ballasted about eighteen miles of track with crushed stone; that the intention of said company was to ballast said track from Campbellsburg to New Albany, a distance of forty-five miles, of which distance the eighteen miles above referred to forms a part; that said portion of the track between said places has never been ballasted and is in such a condition now that the ballasting thereof is necessary to the safe and economical management of said property; that it will require an expenditure of about thirty thousand dollars ($30,000) to complete said ballasting between said
154 places; that from Campbellsburg to La Fayette, a distance of
152 miles, parts thereof at different places between said points have not been ballasted and that the distance between said places actually requiring ballast is 75 miles, and that the approximate cost of ballasting the same will be forty-five thousand dollars ($45,000).

etition.

Equipment of Engines and Cars with Air Brakes and Automatic Couplers.

Your receiver further prays for instructions and proper orders for his guidance in the matter of affirming a contract made and entered into by and between the Louisville, New Albany & Chicago Railway Company, prior to his appointment as receiver, and the New York Air Brake Company, a corporation of New Jersey, for the equipment of its cars and engines with air brakes in conformity to the act of Congress approved March 2, 1893, and for a proper order affirming a contract also entered into with the Trojan Car Coupler Company for the equipment of its cars and engines with automatic couplers in conformity with said act of Congress.

Your petitioner represents that said Railway Company was and is engaged in handling interstate business, with its cars, engines and equipment, and that it will be necessary to equip the following number of cars and engines with automatic couplers and air brakes so as to conform to said act of Congress and to avoid the penalties provided for violation thereof; to-wit: 4500 cars with
155 air brakes and automatic couplers; 25 engines with air brakes;
76 engines with automatic couplers and 79 passenger cars with automatic couplers; that the approximate cost of such appliances, including material, labor and freight will be three hundred and twenty-five thousand dollars.

Your petitioner represents that prior to his appointment as such receiver and while acting as vice-president and general manager of said company, he made and concluded a contract with the New York Air Brake Company, a corporation of New Jersey, for the purchase of the necessary automatic air brakes for said engines and cars.

Your petitioner represents that he carefully investigated other air brakes and the prices thereof, and that the prices at which the same are obtainable under this contract are lower in the aggregate by fifty thousand dollars than the same could be obtained from the Westinghouse Air Brake Company and much below the price that could now be obtained from said New York Air Brake Company but for said contract; that the officers representing the mechanical department of said railway have carefully investigated said air brake and report the same to your receiver as practical and efficient; that before making said contract your receiver ascertained that two thousand five hundred of said New York Air Brakes were

Petition

in use on the Missouri, Kansas and Texas Railway and that all of the equipment of the Great Northern Railway is supplied with said brake, and the officials of said railways advise your receiver that the said air brake gives good and satisfactory service; that it is represented by said New York Air Brake Company to your receiver that said company holds valid patents for said air brake and that it has not in any manner infringed upon the patent of the 156 Westinghouse Air Brake Company or that of any other company. But your receiver represents that there is litigation between the Westinghouse Air Brake Company and said New York Air Brake Company now pending in one of the United States courts in New York, in which it is claimed by said Westinghouse Company that the air brake of said New York Air Brake Company is an infringement on their patent, and your petitioner represents that said New York Air Brake Company is willing to give a bond of indemnity against loss or damages arising out of said suit or any other suit pending or which may be brought involving the validity of said patent, and your receiver herewith presents for the inspection of the court said indemnity bond and prays the advice and order of the court as to whether he shall carry out said contract and equip the cars and engines of said railway with said air brake, in accordance therewith and in case the court approves said contract that an order may be made affirming the same; that the approximate cost of equipping the cars and engines of said road with said New York air brake will be two hundred and fifty thousand dollars.

Your petitioner further represents that while he was the vice-president and general manager of said company and before his appointment as receiver herein he had entered into a contract with the Trojan Car Coupler Company, for the purchase of automatic couplers; that under said contract said Trojan Car Coupler Company agreed to furnish automatic couplers at $15 per car, which is a very low rate for said appliance; that the provisions of said act of Congress applying to said equipment as your peti- 157 tioner is advised, are sections one, two, three and six, appearing in the supplement of the Revised Statutes of the United States, Vol. 2, page 102, and under the terms thereof the said equipment must be supplied with said air brakes and automatic couplers on or before the first day of January, 1898, and your receiver represents that when said cars are so equipped, according to the provisions of said act of Congress that there will be a great saving of life and limb among the employes, and that the same will very largely reduce the cost and expense incurred under the prestition. ent method of operating trains by hand brakes and hand couplers and will therefore be in the interest of all the bondholders, stockholders and lienholders of every description.

Your receiver therefore prays:

First: That an order may be made directing and ordering him to construct said new bridges:

Second: To make the necessary repairs on engines and cars:

Third: To make the new alignment and prosecute the work of ballasting the track:

Fourth: That he be directed to affirm and ratify the contracts for the equipment of cars and engines with air brakes and automatic couplers:

And your receiver represents that the present earnings of said road after the payment of operating expenses, fixed charges, etc., will not be sufficient to meet the proposed expense or any part thereof, and that it will be necessary to borrow the money for said purposes; that it will not be necessary to expend more than
158 two hundred thousand dollars ($200,000) at present for the
reason that a great part of said work cannot be economically done during the winter months, but to the extent that said work or part thereof can be done with economy asks that the same be authorized, and to this end the receiver prays to be permitted to exercise his discretion in the time and manner of prosecuting said work and the expenditure of the said amount of two hundred thousand dollars therefor.

And your receiver represents that he can borrow said amount of two hundred thousand dollars by executing his note or notes as receiver, with interest not to exceed six per centum per annum, and providing therein that the same shall be paid out of the future earnings of the road, and asks that the order of the court authorizing said loan shall provide that the said money so borrowed on such notes shall not interfere with or affect the existing liens under the different trust deeds securing bonds upon the corpus of said railroad; and your receiver represents that it is necessary in his judgment that all of said work and improvements should be done and made for the safe and economical management of said property and for the best interest of all persons holding securities upon said property.

Petition.

Wm. H. McDoel,
Receiverof the Louisville, New Albany
& Chicago RailwayCompany.

E. C. Field.
Attorney foı Receiver.

159 And afterwards, to-wit: at the November term of said court, on the 11th day of December, 1896, before the Honorable William A. Woods, Judge of said court, the following further proceedings in the above entitled cause were had, to-wit:

Comes now Floyd A. Woods, and enters his appearance herein as solicitor for the Central Trust Company of New York.

And afterwards, to-wit: at the November term of said court, on the 14th day of December, 1896, before the Honorable William A. Woods, Judge of said court, the following proceedings in cause No. 9,416 were had, to-wit:

Come now the complainants, by Butler, Notman, Joline & Mynderse and Floyd A. Woods, their solicitors, and file their bill of complaint herein in the words following, to-wit:

To the Honorable the Judges of the Circuit Court of the United States for the District of Indiana, Sitting in Equity:

Bill of Complaint of Cent. Trust Co. and Murdock.

160 Central Trust Company of New York, a corporation created and existing under the laws of the State of New York, and a resident and citizen of the State of New York, and James Murdock, a resident and citizen of the State of Indiana, bring this their bill of complaint against the Louisville, New Albany and Chicago Railway Company, a corporation created and existing under the laws of the State of Indiana, and a resident and citizen of the State of Indiana, and an inhabitant of the District of Indiana, and thereupon your orators complain and say:

I. On and prior to the 1st day of September, 1894, the Louisville, New Albany and Chicago Railway Company (hereinafter styled the New Albany Company) was and it still is a corporation duly created and existing under the laws of the State of

Bill of Complaint of Cent. Trust Co. and Murdock.

Indiana, and was and is fully authorized to construct, equip, own, maintain and operate the lines of railway herinafter mentioned, and to execute and deliver the bonds and mortgage hereinafter mentioned.

II. Your orator Central Trust Company of New York was at the times hereinafter mentioned and now is a corporation created and existing under the laws of the State of New York, and bearing the corporate name of the Central Trust Company of New York, and at all the times hereinafter mentioned it was and now is duly authorized and empowered under the terms of its charter to take and hold in trust the property transferred and conveyed to it in trust as hereinafter stated, and to execute and perform the trusts imposed upon it under and by virtue of the mortgage or deed of trust hereinafter described. Your orator James Murdock is a citizen of the State of Indiana, and resides in Lafayette, in said State of Indiana.

III. On or about the 1st day of September, 1894, said New Albany Company had in its possession and use certain railroad equipment and rolling stock of the original cost of $1,202,234, such equipment consisting of the following five certain parcels, that is to say:

1. 300 box cars, built by the Haskell & Barker Car Company, costing $140,010.

2. 250 flat cars, built by the Haskell & Barker Car Company, costing $96,250.

3. 200 coal cars and 50 stock cars, built by the Haskell & Barker Car Company, costing $102,750.

4. 300 box cars and 250 flat cars, built by Oliver Adams, agent, costing $293,224.

5. 1,000 flat cars, built by the Haskell & Barker Car Company, costing $370,000.

The title to the equipment above mentioned was at the time in the builders thereof, and said New Albany Company desired to acquire the title to the same, said equipment being necessary in the operation of its railroad.

Bill of Com
plaint of C
Trust Co.
Murdock.

IV. On or about the 1st day of September, 1894, the New Albany Company, in order to provide means to purchase said equipment and to obtain the title thereto, in the lawful exercise of its corporate powers, and due corporate action having first been had, resolved and determined to issue its bonds, to be known as Equipment Five Per Cent. Sinking Fund Mortgage Gold Bonds, aggregating in amount not exceeding $1,000,000 in gold coin
161 of the United States of America, said bonds to be for $1,000 each, payable twenty years from December 1, 1894, unless sooner paid out of the sinking fund to be provided for the payment of the same, or unless said New Albany Company should elect to pay the same before that time, and to bear interest from the 1st day of December, 1894, payable semi-annually, at and after the rate of five per cent. per annum, in like gold coin, on the 1st days of June and December in each and every year. In pursuance of the said resolution and determination, and in the exercise of its lawful corporate powers, said New Albany Company did thereafter make and execute 1,000 bonds of said series, amounting to $1,000,000 of principal par value, by each of which bonds said New Albany Company, for value received, promised to pay to your orator, Central Trust Company of New York, or to the bearer thereof, the sum of $1,000 in gold coin of the United States of the present standard of weight and fineness, at the office or agency of said New Albany Company, in the City of New York, on the 1st day of December, 1914, (unless such bond should be sooner redeemed, as provided in the mortgage hereinafer mentioned), and to pay interest thereon in the meantime from the 1st day of December, 1894, at the rate of five per cent. per annum, payable semi-annually in like gold coin, on the 1st days of June and December in each year, at said office or agency, upon presentation of the coupons thereto annexed, as they severally should become due.

V. On or about said 1st day of September, 1894, said New Albany Company, in pursuance of the resolution and determination above mentioned, and in the due exercise of its corporate powers, and due corporate action having first been had, in order to secure the payment of the principal and interest of the said bonds as the same should respectively become due and payable, according to the tenor and effect of the said bonds and the coupons or interest warrants accompanying the same, made, executed and delivered unto your orators a certain mortgage or deed of trust bearing date on the said 1st day of September, 1894, and therein and thereby granted, bargained, sold, aliened, remised, released, ill of Complaint of Cent. rust Co. and urdock.

conveyed and confirmed unto your orators, and to the survivor of them, and to their successors and assigns forever, certain railroads and property described in said mortgage as follows (the words "party of the first part"and "Railway Company" in said description being used to designate the New Albany Company):

"All the railway system and property of the said party of the first part, of every kind and nature, and however owned, held, leased or enjoyed, together with all the equipment, appurtenances and franchises, thereunto appertaining, being more particularly described as follows:

All the present line of railway extending from New Albany, Indiana, to Michigan City, in the same State, and also from Indianapolis, Indiana, to a point on the State line between Indiana and Illinois, about twenty miles southeast of the City of Chicago, Illinois, and also its proprietary and owned line of railroad, called the Bedford and Bloomfield Railroad, extending from Bedford to Switz City, in Indiana, and also its other proprietary and owned line of railroad, called the Orleans, West Baden and French Lick Springs Railroad, extending from Orleans to French Lick, Indiana, and also all its lands, station buildings, tracks and terminal facilities in the City of Louisville, Kentucky, and also all its rights, interest, proprietary and leasehold estate and terminal facilities in the franchises, property, tracks and station buildings of the Chicago and Western Indiana Railroad Company, and in
162 the Belt Railway Company of Chicago, in the City of Chicago, or elsewhere in the State of Illinois; and also all its real estate, trackage, leasehold and contract rights and terminal properties, stations, sidings and franchises in the City of Indianapolis, Indiana, and also all its leasehold and contract rights, trackage and terminal facilities vested in the party of the first part by virtue of its certain written contracts with the Jeffersonville, Madison and Indianapolis Railroad Company, the Pennsylvania Company, and the Louisville Bridge Company, whereby the trains and traffic of the said party of the first part are moved and handled between the City of New Albany, Indiana, and the City of Louisville, Kentucky, the before mentioned system of railroads owned by the said party of the first part and exclusive of tracks leased and operated by it, being about five hundred and twelve miles in length, and situate in the Counties of Floyd, Clark, Washington, Orange, Lawrence, Greene, Monroe, Owen, Putnam, Montgomery, Tippecanoe, White, Pulaski, Starke, La Porte, Marion, Hamilton, Boone, Clinton, Carroll, Jasper, Newton and Lake, in the

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State of Indiana, and Cook County, in the State of Illinois. and Jefferson County in the State of Kentucky; including and conveying by these presents all the property of every sort or nature, real, personal and mixed, now owned by said railway company for the purposes of and connected with or appertaining to the railroads or railways above mentioned and described, together with all the lands, tracks, lines, rails, bridges, ways, buildings, shops, tanks, piers, wharves, structures, erections, turntables, fences, walls, fixtures, franchises, privileges and rights of the railway company, and also all locomotives, engines, tenders, cars, carriages, tools, machinery, manufactured and unmanufactured materials, coal, wood and supplies of every kind belonging or appertaining to the railway company; also all the tolls, incomes, issues and profits, arising out of the said property and its operation, and all rights to receive and recover the same, also all estate, right, title and interest of the party of the first part in and to any and all real estate belongnig to said party of the first part; also all leasehold lands, with the buildings thereon erected, it being the true intent and meaning of these presents that the said railway company, party of the first part, shall and doth convey to the said trustees all and all manner of franchises of every kind and description, however derived and wherever situate, all and all manner of real estate or interest therein, wherever such real estate may be situate, and all and all manner of personal property, of whatever nature or description the same may be, at the date of these presents owned or possessed by the said railway company, whether within or without the State of Indiana; and also all choses in action of every kind and description, including bills receivable, book accounts, traffic balances, all books of record and all accounts of every kind and description, all papers, maps, inventories and documents in anywise referring or relating to the property or franchises hereby conveyed; and also all franchises and property and all personal rights or interest in any franchises or property of every kind and description, real, personal or mixed, and wherever the same may be situate, that may, at any time, before or after the date of this indenture, be acqured by or for the said railway company, for purposes connected with or appertaining to said railroads or railways, hereby conveyed, all of which it is hereby covenanted shall enure, by way of accretion, to the benefit and advantage of said trustees, and by way of further and better security for the bonds to be issued hereunder; it being intended and here-
163 by expressly covenanted that the lien of this indenture shall embrace and bind all railroads, real and personal property, choses in action, contracts, rights and franchises which the said

railway company now owns, as fully and to the same extent as if all such property were specifically described herein and conveyed hereby."

To have and to hold all and singular the above mentioned and described railways, premises and property, rights, franchises and appurtenances; unto your orators, their and each of their successor or successors and assigns forever, in trust, nevertheless, for the equal *pro rata* benefit and security of all the holders of all the said bonds secured by said mortgage or deed of trust, without any preference or priority by reason of priority in time of issue or negotiation thereof, or otherwise, and for the uses and purposes, and upon the trusts, conditions, covenants and agreements, in said mortgage or deed of trust declared and expressed.

In and by said mortgage or deed of trust it was, moreover, expressly provided that, in further consideration of the premises and the mutual covenants and agreements therein set forth, and of one dollar, paid by each party to each of the others, it was thereby expressly agreed by and between the parties thereto that the equipment and rolling stock at any time held or acquired by your orators, or either of them, their and each of their successor or successors, as provided in said mortgage or deed of trust, were and should be charged with the agreements, and were and should be held by your orators upon the trusts and for the uses and purposes in said mortgage declared and expressed.

VI. The said mortgage or deed of trust was authorized, made, executed and delivered in all respects in conformity with law, and was duly recorded in the office of the recorder of Lawrence County, Indiana, September 25, 1894, in Book 19 of Mortgages, at page 187, and was also duly recorded in all the other counties wherein the mortgaged property or any part thereof was or is situated, and in all places wherein said mortgage was or is by law required to be recorded. Your orators duly accepted the trust created in and by said mortgage or deed of trust before the recording of the same as aforesaid. Your orators refer to the said mortgage so recorded, and to a true copy thereof annexed to this bill of complaint as a part thereof, marked "Exhibit A," for a particular statement of the terms and provisions of said mortgage or deed of trust and of the bonds issued thereunder, and your orators pray that said copy of said mortgage or deed of trust marked "Exhibit A" may be taken in all respects as if it had been fully set forth in the body of this bill.

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VII. In and by said mortgage or deed of trust it was, among other things, provided that if and whenever the equipment and rolling stock included in and of the parcels hereinbefore described should be transferred to and the title thereto vested in the Central Trust Company of New York, one of your orators, by proper instrument in writing, said trust company should certify and deliver bonds of the issue secured by said mortgage or deed of trust, the principal of which bonds should be equal in amount to the cost of such parcel of equipment and rolling stock, as hereinbefore stated, and that if the bonds remaining in the hands of said trust company at the time when the title to all of said equipment and rolling stock included in all of said parcels hereinbefore described should have been so transferred to it, should not be equal to the cost of the final parcel so transferred to it, said trust
164 company should, as soon as the title to all of said equipment and rolling stock should have been so transferred to it, certify and deliver, as therein provided, all bonds of the issue above mentioned which should still remain in its hands unissued.

Your orators further show that since the execution and delivery of said mortgage or deed of trust all of the equipment and rolling stock included in all of the five parcels hereinbefore described has been transferred to and the title thereto vested in said Central Trust Company of New York by proper instrument in writing, and that said Central Trust Company of New York now holds the title to all of said equipment and rolling stock as trustee of and under said mortgage or deed of trust, and as further security for the bonds issued thereunder and secured thereby.

VIII. The said bonds to the aggregate amount of $1,000,000, so made and executed as aforesaid, were duly authenticated by the endorsement thereon of the certificate of said Central Trust Company of New York, one of your orators, as provided in said bonds and mortgage, and so authenticated, were duly delivered to said New Albany Company when and as the title to said equipment and rolling stock was transferred to and vested in said Central Trust Company, and in all respects in accordance with the provisions of said mortgage or deed of trust, and your orators are informed and believe that 709 of said bonds so issued and delivered, amounting to $709,000 principal par value, have been duly issued, negotiated and sold to divers persons, who have thereby become *bona fide* holders thereof as purchasers of the same for value, and that all of said 709 bonds are now outstanding, and valid and binding obligations of said New Albany Company, and the holders of said bonds

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are numerous, and the names and residences of many of such holders are unknown to your orators. Your orators are informed and believe that 291 of said bonds so issued and delivered, being the remainder of said issue, are still held by said New Albany Company in its treasury, and have never been issued, negotiated or sold by it.

IX. A part of the property covered by said mortgage consists of shares of the capital stock of sundry railroad companies owned by said New Albany Company, and representing certain interests and property rights of said New Albany Company in and to certain lines of railroad. Said shares of stock have been delivered to and deposited with the Farmers' Loan and Trust Company under and by virtue of a certain agreement bearing date May 18, 1886, to which said New Albany Company and said Farmers' Loan and Trust Company and John H. Barker are parties, and which is known as a collateral trust agreement, and under said agreement said shares of stock were deposited with said Farmers' Loan and Trust Company as further security for the bonds issued under and secured by the mortgage to said Farmers' Loan and Trust Company and said John H. Barker, as trustees, bearing date January 1, 1886. The shares of stock, which have been so delivered to, and are now held by said Farmers' Loan and Trust Company, are the following:

(1) Nine thousand nine hundred and ninety-nine shares of the capital stock of the Chicago and Western Indiana Railroad Company, of the par value of $100 each.

(2) Two thousand three hundred and ninety-nine shares of the capital stock of the Belt Railway Company of Chicago, of the par value of $100 each.

165 (3) Eleven thousand nine hundred and ninety shares of the capital stock of the Bedford and Bloomfield Company, of the par value of $50 each.

(4) Two thousand nine hundred and ninety shares of the Orleans, West Baden and French Lick Springs Railway Company, of the par value of $100 each.

Your orators allege that said shares of stock are a part of the property covered by said mortgage made by said New Albany Company to your orators, and form a part of the security given by and under said mortgage for the payment of said bonds which have been issued thereunder, and that your orators have a lien upon said shares of capital stock as security for the payment of said bonds, subject only to the lien of said Farmers' Loan and Trust Company and said John H. Barker under and by virtue of said mortgage made and executed to said Farmer's Loan and Trust Company and said John H. Barker, as trustees, and under and by virtue of said collateral trust agreement, dated May 18, 1886, and to the lien of a certain mortgage made and executed by said New Albany Company to Central Trust Company of New York, one of your orators herein, and to John H. Stotsenburg, of New Albany, Indiana, bearing date May 1, 1890.

X. The said New Albany Company made default in payment on the 1st day of December, 1896, of the installment of interest due on that day on all of said bonds issued and outstanding as aforesaid, and secured by said mortgage to your orators as aforesaid, and said default still continues. Your orators are informed and believe that demand was duly made on the said New Albany Company for the payment of the said installment of interest due upon said bonds December 1, 1896, as aforesaid, and that such demand was made on or about the day when said installment of interest became due as aforesaid, and that the coupons representing said installment of interest, or many thereof, were duly presented, and payment thereof duly demanded, but that payment of said installment of interest and and of said coupons was refused, and that, neither on said 1st day of December, 1896, nor at any time since, did said New Albany Company have or provide at its office or agency in the City of New York, or elsewhere, any funds with which to pay said installment of interest or any part thereof, and your orators allege that no part of said installment of interest has been paid by said New Albany Company, or by any other person or corporation on its behalf, but that the whole of said installment of interest remains due. owing and unpaid.

XI. In a certain cause brought in the Circuit Court of the United States for the District of Iudiana, wherein John T. Mills, Jr., was complainant, and the Louisville, New Albany and Chicago Railway Company (one of the defendants herein) was defendant, such proceedings were had that on or about the 24th day of August, 1896, one William H. McDoel was appointed receiver of all the railroads and property of every description of the defendant New Albany Company, and thereupon said William H. McDoel, as such receiver, duly entered upon and took possession of all the railroads and property of the defendant New Albany Company, including all the property covered by and embraced in said mortgage to your orators. Thereafter, in a certain suit brought in the Circuit Court of the United States for the Northern District of Illinois, between the same parties, a similar order was made and entered confirming such receivership of said William H. McDoel.

Thereafter, and on or about the 12th day of November, 1896, 166 the Farmers' Loan and Trust Company and John H. Barker brought suit against said Louisville, New Albany and Chicago Railway Company and others in said Circuit Court of the United States for the District of Indiana, and also in said Circuit Court of the United States for the Northern District of Illinois, and Central Trust Company of New York, one of your orators, and John H. Stotsenburg also brought suit against said Louisville, New Albany and Chicago Railway Company and others in each of the courts above mentioned, and thereupon, and on or about said 12th day of November, 1896, said suits brought by said John T. Mills, Jr., and by said Farmers' Loan and Trust Company and John H. Barker, and by said Central Trust Company of New York, and John H. Stotsenburg, in said Circuit Court of the United States for the District of Indiana, were consolidated into one suit under the title of The Farmers' Loan and Trust Company and John H. Barker, complainants, against Louisville, New Albany and Chicago Railway Company and others, defendants, and the receivership of said William H. McDoel was extended to said consolidated cause, and he was appointed receiver therein; and in like manner, on or about said 12th day of November, 1896, said three suits above mentioned pending in said Circuit Court of the United States for the Northern District of Illinois were also duly consolidated into one cause under the title of the Farmers' Loan and Trust Company and John H. Barker, complainants, against Louisville, New Albany and Chicago Railway Company and others, defendants, and the receivership of said William H. McDoel was extended to said last-mentioned consolidated cause, and he was appointed receiver therein. Under and by virtue of the orders of said courts in said suits above mentioned, said William H. McDoel now holds and has in his possession, as receiver of this court, all of the railroads and property of said New Albany Company, and this court, by virtue of such receivership, now has all of said railroads and property in its possession and under its control.

XII. Your orators are informed and believe that the defendant New Albany Company is insolvent and wholly unable to pay its debts and obligations, and that the property and premises covered by the said mortgage so made to your orators as aforesaid are of a value far less in amount than the amount of the bonds issued thereunder, and that said mortgaged property and premises are and constitute an inadequate security for the payment of the said bonds. Your orators further show that the financial affairs of the defendant New Albany Company are in an embarrassed condition, and your orators as trustees under said mortgage cannot execute or perform the trusts provided in and by said mortgage, or protect the rights of the holders of the bonds thereby secured, without the aid or interposition of this honorable court, sitting in equity, and without a judicial sale of all the mortgaged premises, franchises and appurtenances covered by the said mortgage or deed of trust, and that until such sale can be had and the proceeds thereof distributed it is expedient and necessary that all the said mortgaged property of every nature and description whatsoever, shall be placed in the possession and under the control of a receiver or receivers, to be appointed by this honorable court, with such proper powers and control over the same as to this court shall seem just. Your orators are informed and believe that the said property covered by said mortgage constitutes and forms one railroad system, and that it is for the interest of all parties that it should be sold as an entirety, and that the value of it in portions and sections is and will be 167 much less that its value as a whole, and that said mortgaged premises are so situated that the same cannot be sold in separate parcels without great and irreparable loss and sacrifice.

XIII. Your orators further allege that there is due and owing from said defendant New Albany Company to your orators, or the holders of said bonds, the sum of $17,725, with interest from December 1, 1896. Your orators are informed and believe that no proceedings have been had at law or in equity for the collection of the debt secured by said mortgage, or any part thereof, save only this suit.

Your orators, therefore, in view of the premises, seek the aid of this Honorable Court in equity, wherein only adequate relief can be administered in matters of this nature, and prays as follows:

1. That the said mortgage, dated September 1, 1894, may be foreclosed.

2. That the lien of the said mortgage may be decreed and established as a lien upon the railroads and other property covered

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thereby and hereinbefore mentioned and described, including the shares of capital stock hereinbefore particularly mentioned, and the equipment and rolling stock hereinbefore described, the title to which has been transferred to said Central Trust Company of New York, one of your orators, and that the amount due, and to become due, for principal and interest upon the said bonds outstanding and secured by said mortgage may be ascertained and determined.

3. That in default of the payment of the sum so found due within a time to be limited by the decree of this Honorable Court it may be decreed that the defendants and all persons claiming under them, or either of them, any interest in said mortgage property as aforesaid, subsequent to the lien of said mortgage, be absolutely barred and foreclosed of and from all right or equity of redemption of, in and to said mortgaged premises, or any part thereof, and that the sale of the whole of the mortgaged property and premises be ordered in accordance with law and the practice of this Honorable Court, and that the proceeds may be applied to the expenses of this suit, and to the payment of the amounts found due as aforesaid, and the balance thereof as the court may direct.

4. That a receiver or receivers be appointed to take possession of the railroad, property, estate and franchises of the defendant New Albany Company, and the earnings and proceeds thereof, with power to operate the said railroads and property, and with all such power and authority as may be requisite to preserve the same until the sale thereof, as the same may be decreed and ordered by this Honorable Court, and to secure the earnings of the said railroads and property to the use of the bondholders, and with such other powers and authority as are usually possessed by receivers in like cases, as this court may direct.

5. That the defendant, its officers, directors and all other persons claiming or pretending to claim under them, may be restrained by injunction of this Honorable Court from interfering with or disposing of said mortgaged premises, property and franchises, or any part or parts thereof, or any earnings or proceeds thereof.

168 6. That the defendant herein may answer all and singular the premises, but not under oath, which is hereby expressly waived.

7. That your orators may have such other and further relief

in the premises as the nature and circumstances of the case may require, and to your Honors seem meet.

Bill of Complaint of Cen Trust Co. and Murdock.

May it please your Honors to grant unto your orators not only a writ of injunction, conformable to the prayer of this bill, to be issued to the said Louisville, New Albany and Chicago Railway Company, but also a writ of subpœna, to be directed to the said Louisville, New Albany and Chicago Railway Company, commanding it at a certain time, and under a certain penalty, to be therein specified, to be and appear before this honorable court, then and there to answer the premises, and to abide by the order and decree of the court herein, and that said corporation may appear herein according to law.

CENTRAL TRUST COMPANY OF NEW YORK,
[SEAL] By E. FRANCIS HYDE,
Second Vice-President.
JAMES MURDOCK,
By BUTLER, NOTMAN, JOLINE & MYNDERSE,
His Solicitors.

BUTLER, NOTMAN, JOLINE & MYNDERSE,
Solicitors for Complainants.
ADRIAN H. JOLINE,
Of Counsel.

STATE, CITY AND COUNTY OF NEW YORK, } ss.
SOUTHERN DISTRICT OF NEW YORK. }

E. FRANCIS HYDE, being duly sworn, deposes and says that he is an officer, to wit, the second vice-president of the Central Trust Company of New York, one of the complainants in this suit; that he has read the foregoing bill of complaint and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true; that the seal affixed to the said bill of complaint is the corporate seal of said complainant, and was thereunto affixed by due and proper authority.

E. FRANCIS HYDE.

Sworn to before me this 8th day of December, 1896.

LELAND S. STILLMAN,
[SEAL] Notary Public,
Kings County,
Certificate filed in N. Y. Co.

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EXHIBIT A.

xhibit B to same.

This indenture, made and entered into this first day of September, one thousand eight hundred and ninety-four, by and between the Louisville, New Albany and Chicago Railway Company, a corporation duly created and existing under the laws of the State of Indiana, party of the first part, and the Central Trust Company of New York, a corporation duly created and existing under the laws of the State of New York, hereinafter called the Trust Company, and James Murdock, of Lafayette, in the State of Indiana, parties of the second part.

Whereas, the party of the first part owns and is operating a system of railroads in the State of Indiana, about five hundred and twelve miles in length, which is composed of a line from New Albany, on the Ohio River, to Michigan City, on Lake Michigan, hereinafter called the Main Line, a line from Indianapolis to a junction with the Chicago and Western Indiana Railroad at a point on the State line between Indiana and Illinois about twenty miles southeast of Chicago hereinafter called the Air Line together with certain proprietary and leasehold interests in the franchises and railroads of the said Chicago and Western Indiana Railroad Company and the Belt Railway Company of Chicago, and in the terminal facilities of the said companies in and near the City of Chicago, Illinois, and all its real estate, buildings, tracks, trackage and terminal rights, facilities and franchises in the other cities above mentioned, and in the City of Louisville, in the State of Kentucky, and between said City of Louisville and the City of New Albany and in the City of Indianapolis, Indiana, and is
170 also the exclusive owner of the Bedford and Bloomfield and
the Orleans, West Baden and French Lick Springs Railroads;

And whereas, there are now existing certain liens upon said system of railroads, including a certain mortgage made July 1st, 1880, by the party of the first part to John C. New, of Indianapolis, and Washington C. DePauw, of New Albany, in the State of Indiana, as trustees, and a certain mortgage made August 10th, 1881, by the party of the first part to John C. New, of Indianapolis, as trustee, and a certain mortgage made January 1st, 1886, by the party of the first part to the Farmers' Loan and Trust Company, of the City of New York, and John H. Barker, of Michigan City, as trustees, and a certain mortgage made May 1st, 1890, by the party of the first part to the Central Trust Company

Exhibit A to sa

of New York and John H. Stotsenburg of New Albany, as trustees;

And whereas, the Railway Company has in its possession and use certain railroad equipment and rolling stock of the original cost of one million two thousand two hundred and thirty-four dollars: that is to say:

1. Three hundred box cars built by the Haskell & Barker Car Company, costing one hundred and forty thousand and ten dollars.

2. Two hundred and fifty flat cars built by the Haskell & Barker Car Company, costing ninety-six thousand two hundred and fifty dollars.

3. Two hundred coal cars and fifty stock cars, built by the 171 Haskell & Barker Car Company. costing one hundred and two thousand seven hundred and fifty dollars.

4. Three hundred box cars and two hundred and fifty flat cars, built by Oliver Adams, agent, costing two hundred and ninety-three thousand two hundred and twenty-four dollars.

5. One thousand flat cars, built by the Haskell & Barker Car Company, costing three hundred and seventy thousand dollars.

And the title to the equipment above mentioned is at present in the builders thereof, and the railway company desires to acquire the title to the same, said equipment being necessary in the operation of its said railroad.

And whereas, the Railway Company, in the exercise of the powers in that behalf possesed by it under the laws of the State of Indiana, and in order to provide means to purchase said equipment and to obtain the title thereto, and in accordance with resolutions duly adopted by its board of directors and by its stockholders at meetings of said board of directors and of said stockholders, duly and regularly called and held, has determined to issue its bonds to be known as Equipment Five Per Cent. Sinking Fund Mortgage Gold Bonds, aggregating an amount not exceeding one million dollars in gold coin of the United States of America, said bonds to be for one thousand dollars each, payable twenty years from De-xhibit A to same.

cember 1, 1894, unless sooner paid out of the sinking fund to be provided for the payment of the same, or unless the Railway Company shall elect to pay the same before that time, and to bear interest from the first day of December, 1894, payable semi-annually at and after the rate of five per cent. per annum in like gold
172 coin on the first days of June and December in each and every year. .

And whereas, the said bonds and the interest warrants to be annexed thereto, and the trustees' certificate to be endorsed thereon are to be in the form or substantially the form following, that is to say:

UNITED STATES OF AMERICA,

STATE OF INDIANA.

No. . . . $1,000.

Louisville, New Albany and Chicago Railway Company.
Equipment Five Per Cent. Sinking Fund Mortgage Gold Bond.
Issue limited to $1,000,000.

The Louisville, New Albany and Chicago Railway Company, a corporation of the State of Indiana, for value received, hereby promises to pay to the Central Trust Company of New York, or to bearer hereof, the sum of one thousand dollars in gold coin of the United States of the present standard of weight and fineness, at the office or agency of the said Railway Company in the City of New York, on the first day of December, in the year one thousand nine hundred and fourteen (unless this bond be sooner redeemed as provided in the mortgage hereinafter mentioned), and to pay interest thereon in the meantime from the first day of December, one thousand eight hundred and ninety-four, at the rate of five per cent. per annum, payable semi-annually in like gold coin on the first days of June and December in each year at said office or agency upon presentation of the coupons hereto annexed as they severally become due. The principal and interest of this bond is payable without relief from valuation or appraisement laws. This bond is one of a series of bonds of like tenor and
173 effect numbered consecutively from one upwards and secured by indenture of mortgage or deed of trust to the Central Trust Company of New York, and James Murdock, of Indiana, as trustees, dated Setember 1, 1894. covering the equipment proposed to be acquired by means of the proceeds of said bonds as provided in said mortgage or deed of trust, and also, all the other property of

Exhibit A to sa

said Railway Company, as specified and described in said mortgage or deed of trust.

This bond may at any time upon production thereof to said Railway Company and proper endorsement being made thereon, be registered as to the principal thereof upon the books of the Railway Company in the name of the holder thereof, and thereupon its transferability by delivery shall cease, and thereafter it can be transferred only by the registered holder or his attorney by transfer duly made upon said books, unless the last transfer shall have been made to bearer, and this bond shall be subject to successive registrations and transfers to bearer at the option of the holder, but such registration shall not restrain or effect the transferability of the coupons by delivery.

After six months default in the payment of any semi-annual installment of interest hereon, the principal of all the bonds secured by said indenture of mortgage or deed of trust may be made immediately due and payable as prescribed therein.

This bond is entitled to the benefit of the provisions of the sinking fund provided in said mortgage or deed of trust, and may be paid prior to the maturity thereof at one hundred and five
174 per cent. of the par value thereof, and accrued interest thereon, as provided in said mortgage or deed of trust.

This bond shall not be valid until the certificate endorsed hereon shall have been signed by the Central Trust Company of New York, one of said trustees, or its successor or successors in the trust, and it is issued and held under and subject to the terms and conditions of the said mortgage or deed of trust.

In witness whereof, the said Louisville, New Albany and Chicago Railway Company has caused its corporate seal to be hereto affixed and these presents to be signed by the president and attested by its secretary, and has caused each of the said coupons to be attested by the engraved signature of its treasurer, this first day of September, one thousand eight hundred and ninety-four.

LOUISVILLE, NEW ALBANY AND
CHICAGO RAILWAY COMPANY,
[SEAL] By......................
President.

Attest:

....
Secretarty.

Exhibit A to same.

(Form of Coupon.)

The Louisville, New Albany and Chicago Railway Company, on................will pay to bearer twenty-five dollars in gold at is office in the City of New York, being six months' interest on its equipment five per cent. Gold Bond No. ....

Treasurer.

(Form of Trustee's Certificate.)

Central Trust Company of New York hereby certifies that this is one of the bonds issued under the mortgage or deed of
175 trust of the Louisville, New Albany and Chicago Railway Company, bearing date September 1, 1894, and referred to therein.

CENTRAL TRUST COMPANY OF NEW YORK,
Trustee.
By....................
Vice-President.

And whereas, such bonds are not to be entitled to share in the benefit or security of this mortgage or deed of trust unless they shall have endorsed thereon such certificate of the Central Trust Company of New York, or its successor or successors in this trust;

And whereas, the said coupons are to be issued with the engraved signature of the treasurer of the railway company, it being, however, agreed by it that when thus issued such engraved signature shall be as binding as if the signature of such treasurer were affixed to such coupons in his own proper handwriting;

And whereas, by and in accordance with the resolutions of the Board of Directors and of all the stockholders of the railway company adopted at meetings duly and regularly called and held, it has been determined to secure the payment of all the said bonds equally, principal and interest, by this mortgage or deed of trust, in the manner and to the effect hereinafter expressed;

Now, therefore, this indenture witnesseth, that in consideration of the premises and of the sum of one dollar to it paid by the said parties of the second part, the receipt whereof is hereby acknowledged, and to secure the payment of the principal and interest
176 of all the bonds issued hereunder according to the tenor and

effect thereof without preference or priority, and equally and ratably, the party of the first part hath granted, bargained, sold aliened, remised, released, conveyed and confirmed, and by these presents doth grant, bargain, sell, alien, remise, release, convey and confirm, unto the parties of the second part, and to the survivor of them, and their successors and assigns forever, all the railway system and property of the said party of the first part of every kind and nature and however owned, held, leased or enjoyed, together with all the equipment, appurtenances and franchises thereunto appertaining, being now particularly described as follows: All the present line of railway extending from New Albany, Indiana, to Michigan City in the same state, and also from Indianapolis, Indiana, to a point on the state line between Indiana and Illinois, about twenty miles southeast of the City of Chicago, Illinois, and also its proprietary and owned line of railroad called the Bedford and Bloomfield Railroad extending from Bedford to Switz City, in Indiana; and also its other proprietary and owned line of railroad called the Orleans, West Baden and French Lick Springs Railroad, extending from Orleans to French Lick, Indiana; and also all its lands, station buildings, tracks and terminal facilities in the City of Louisville, Kentucky; and also all its rights, interest, proprietary and leasehold estate and terminal facilities in the franchises, property, tracks and station buildings of the Chicago and Western Indiana Railroad Company, and in the Belt Railway Company of Chi-
177 cago, in the City of Chicago, or elsewhere in the State of Illinois; and also all its real estate, trackage, leasehold and contract rights and terminal properties, stations, sidings and franchises in the City of Indianapolis, Indiana; and also all leasehold and contract rights, trackage and terminal facilities vested fn the party of the first part by virtue of its certain written contracts with the Jeffersonville, Madison and Indianapolis Railroad Company, the Pennsylaniva Company and the Louisville Bridge Company, whereby the trains and traffic of the said party of the first part are moved and handled between the City of New Albany, Indiana, and the City of Louisville, Kentucky, the before-mentioned system of railroads owned by the said party of the first part, and exclusive of tracks leased and operated by it, being about five hundred and twelve miles in length, and situate in the counties of Floyd, Clark, Washington, Orange, Lawrence, Green, Monroe, Owen, Putnam, Montgomery, Tippecanoe, White, Pulaski, Stark, LaPorte, Marion, Hamilton, Boone, Clinton, Carroll, Jasper, Newton and Lake, in the State of Indiana, and Cook County, in the State of Illinois, and Jefferson County, in the State of Kentucky, including and conveying by these presents all the property of every sort or nature, real, personal and mixed,

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now owned by the said Railway Company, for the purposes of and connected with or appertaining to the railroads or railways above mentioned and described, together with all lands, tracks, lines, rails, bridges, ways, buildings, shops, tanks, piers, wharves, structures, erections, turn-tables,
178 fences, walls, fixtures, franchises, privileges and rights of the Railway Company, and also all locomotives, engines, tenders, cars, carriages, tools, machinery, manufactured and unmanufactured materials, coal, wood and supplies of every kind belonging or appertaining to the Railway Company; and also all tools, incomes, issues, and profits arising out of the said property and its operation, and all the rights to receive and recover the same, also all estate, right, title and interest of the party of the first part, in and to any and all real estate belonging to said party of the first part; also all leasehold lands, with the buildings thereon erected, it being the true intent and meaning of these presents that the said Railway Company, party of the first part, shall and doth convey to the said trustees all and all manner of franchises, of every kind and description, however derived and wherever situate, all and all manner of real estate or interest therein, wherever such real estate may be situate, and all and all manner of personal property, of whatever nature or description the same may be, at the date of these presents owned or posessed by the said Railway Company, whether within or without the State of Indiana; and also all choses in action of every kind and description, including bills receivable, book accounts, traffic balances, all books of record and all accounts of every kind and description, all papers, maps, inventories and documents, in any wise referring or relating to the property or franchises hereby conveyed; and also all franchises and property and all personal rights or interest in any franchises or property,
179 of every kind and description, real, personal or mixed, and wherever the same may be situate, that may at any time before or after the date of this indenture, be acquired by or for the said Railway Company for the purposes connected with or appertaining to said railways hereby conveyed, all of which it is hereby covenanted shall enure, by way of accretion to the benefit and advantage of said trustees, and by the way of further and better security for the bonds to be issued hereunder; it being intended and hereby expressly covenanted that the lien of this indenture shall embrace and bind all railroads, real and personal property, choses in action, contract rights and franchises which the said Railway Company now owns, as fully and to the same extent as if such property were specifically described herein and conveyed hereby.

To have and to hold, all and singular, the above-mentioned and described railways, premises and property, rights, franchises and appurtenances unto the said parties of the second part, their and each of their successor or successors and assigns forever; in trust, nevertheless, for the equal pro rata benefit and security of the holders of all the said bonds secured hereby without any preference or priority by reason of priority in time of issue or negotiation thereof, or otherwise, and for the uses and purposes and upon the trusts, conditions, covenants and agreements hereinafter declared and expressed.

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And in further consideration of the premises and of the mutual covenants and agreements hereinafter set forth and of one dollar paid by each party to each of the others, and it is expressly
180 agreed by and between the parties hereto that the equipment and rolling stock at any time held or acquired by the parties of the second part or either of them, their and each of their successor or successors, as provided in this indenture, are and shall be charged with the agreements, and are and shall be held by the trustees upon the trusts and for the uses and purposes following.

Article First. The Railway Company, in consideration of the undertakings and agreements of the trustees herein set forth, hereby agrees forthwith to execute and issue in the form hereinbefore recited, and to deliver to the Trust Company to be certified, issued and used for the purposes hereinafter described, bonds of the Railway Company intended to be secured hereby to an amount not exceeding one million dollars, and the Trust Company shall thereupon endorse upon each of said bonds the certificate hereinbefore provided, and shall deliver said bonds upon the order of the Railway Company or its president or secretary only at the time and in the manner following, that is to say:

If and whenever the equipment and rolling stock, included in any of the parcels hereinbefore described, shall be transferred to, and the title thereto vested in, the Trust Company by proper instrument in writing, the Trust Company shall certify and deliver as aforesaid bonds of the issue hereby secured, the principal of which bonds shall be equal in amount to the cost of such parcel of equipment and rolling stock as hereinbefore stated.

If the bonds remaining in the hands of the Trust Company at
181 the time when the title to all of said equipment and rolling stock included in all of said parcels hereinbefore described shall have been so transferred to it shall not be equal to the cost

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of the final parcel so transferred to it, said Trust Company shall as soon as the title to all of said equipment and rolling stock have been so transferred to it certify and deliver as aforesaid, all bonds of the issue above mentioned and intended to be hereby secured which shall still remain in its hands unissued.

Article Second. The Trust Company agrees with the respective persons, firms and corporations who shall at any time become the holders of the bonds or coupons issued hereunder and with the Railway Company that it will hold all the rolling stock and equipment acquired by it with the bonds issued hereunder and intended to be hereby secured as hereinbefore provided in trust under the provisions of this indenture for the equal benefit and security of all the persons, firms and corporations who shall at any time become holders of said bonds or coupons without priority, preference or distinction as to the lien or otherwise by reason of priority in time of the issue or negotiation of any of said bonds so that all of said bonds shall have the same right, lien and privilege under and by virtue of this indenture with like effect as if they had all been executed, delivered and negotiated simultaneously on the date hereof.

Article Third. The Railway Company agrees to pay the
182 principal and interest of all the bonds duly issued hereunder according to the terms thereof when such principal and interest shall become or be due according to the terms of said bonds and of the coupons for interest thereto appertaining without deduction from principal or interest for any taxes, assessments or governmental or other charges imposed on this deed of trust or mortgage, or on any bonds issued hereunder, or on any property or franchises at any time covered hereby, the Railway Company hereby agreeing to pay the same. As the coupons appertaining to said bonds are paid they shall be canceled, and no purchase of any coupons, nor any advance or loan thereon or redemption thereof by or on behalf of the Railroad Company after the same have been detached from the bonds to which they belong shall keep such coupons alive or preserve their lien upon any of said property.

Article Fourth. The Railway Company hereby covenants and agrees that until the payment of all the bonds secured hereby it will, on or before the first day of September in each year, commencing with the first day of September one thousand eight hundred and ninety-eight, pay to the Trust Company the sum of thir-

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ty thousand dollars, which sum shall be applied by said Trust
Company as a sinking fund and to the purchase of bonds secured
hereby at the market rates, not exceeding one hundred and five
per cent. of the par value thereof and accrued interest thereon.
In the event that such bond cannot be purchased at or below the
said rate, then the bonds secured hereby shall be subject to be
drawn for payment and paid as follows: If the Trust Company
shall not have been able to purchase said bonds at or below
183 the said rate within thirty days after any such yearly payment
shall have been made to it, said Trust Company shall draw
by lot bonds secured by this mortgage to be paid for out of the
moneys so paid to it at the rate of one hundred and five per cent.
of the par value thereof, and accrued interest thereon, and the
bonds so drawn shall cease to bear interest from and after the day
specified for that purpose in the public notice of such drawing,
which public notice shall be given by publication thereof twice a
week for eight successive weeks in a daily newspaper published
in the City of New York, but the day so specified shall not less
than sixty days after such drawing. All of such bonds so purchased or drawn and the coupons appertaining thereto shall be
held by said Trust Company uncancelled and shall continue to be
secured hereby, and said bonds shall continue to bear interest in
like manner as the other bonds still outstanding, and the coupons
appertaining to such bonds so held by said Trust Company shall
be paid by the Railway Company when and as the same shall
mature, the Railway Company hereby agreeing to pay the same,
and any and all sums of money so received by said Trust Company for interest upon said bonds so held by it for the sinking fund
shall be applied by it to the purchase or redemption of bonds at
the times when and in the manner that the said yearly payments
to be made by the Railway Company for the sinking fund are to
be so applied. All bonds so held by the Trust Company for the
sinking fund shall be stamped with the words following:

> "Held for the sinking fund of the Louisville, New Albany
> 184 and Chicago Railway Company Equipment Five Per Cent.
> Mortgage."

The Railway Company, if it shall elect so to do, may, on any day on which interest is payable upon said bonds issued hereunder and secured hereby, upon giving notice of its intention so to do by publication thereof twice a week for ninety days in two daily newspapers published in the City of New York, pay all or any part of the said bonds issued hereunder and secured hereby at one

Exhibit A to same. hundred and five per cent. of the par value thereof and accrued interest thereon, and said bonds so to be paid shall cease to bear interest from and after the date mentioned in such notice as the date on which payment will be made.

In the event that the Railway Company shall elect to pay all of said bonds outstanding at the time of such election, the bonds to be paid shall be drawn by lot by the Railway Company and the numbers of the bonds so drawn to be paid shall be given in the published notice above provided.

Article Fifth. Until default shall be made by the Railway Company, its successors or assigns, in the payment of the principal or interest of the said bonds or some of them, or some part thereof, or in the payment of the sinking fund hereinbefore provided to be paid for the purchase or redemption of said bonds, or some part of such sinking fund, the Railway Company, its successors and assigns, shall be suffered and permitted to possess and enjoy the mortgaged premises hereby conveyed and transferred by it, with the appurtenances, and all and singular the rights
185 and franchises hereinbefore described, and hereby conveyed
and transferred, and to receive, take and use the tools, revenues, incomes, earnings and profits thereof.

Article Sixth. The trustees agree with the railway company that so long as there is no default by the railway company in the payment of the principal or interest of said bonds, or any of them, or any part thereof, or in the payment of the sinking fund hereinbefore provided to be paid for the purchase or redemption of said bonds, or any part of such sinking fund, and so long as there is no proceeding of any kind by or against the railway company for the appointment of a receiver or for the foreclosure of any deed of trust or mortgage, the railway company shall have, and is hereby given, the possession and use of the equipment and rolling stock at any time by the Trust Company under the provisions hereof out of the proceeds of the bonds issued hereunder and secured hereby, with the right to receive the earnings thereof.

Article Seventh. The railway company agree with the trustees and with the persons, firms and corporations who shall at any time become holders of bonds or coupons issued under this indenture, that it will hold and use said equipment and rolling stock in accordance with the provisions of this indenture, and will not transfer possession of any thereof to any other persons or corpora-

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tions except temporarily in the usual course of traffic without the written consent of the Trust Company, and that in case possession of any of the equipment or rolling stock furnished for its use by the Trust Company, as provided herein, shall in the course of
186 traffic be transferred from the railway company to any person or corporation, such other person or corporation, so long as any of said equipment or rolling stock shall be in their possession, shall hold the same as bailee of the Trust Company and not of the railway company, and shall be answerable to the Trust Company for the same, and that the railway company in any arrangement it shall make with such other persons or corporations in respect thereto, shall act ouly as the agent of the Trust Company and not on its own behalf.

The railway company further agrees that it will at its own expense keep all the equipment and rolling stock at any time furnished for its use by the Trust Company, as herein provided, in good order and repair, and will at once replace at its own cost any of the same that shall be destroyed from any cause whatever during the continuance of this trust, with other like equipment or rolling stock of equal value, or with such other rolling stock and equipment of different character but of equal value, as may be approved in writing by the Trust Company, and that the railway company will promptly file with the Trust Company a statement in detail of the former equipment and rolling stock, and of the equipment and rolling stock so provided in replacement thereof, and that the railway company will make all repairs and replacements to the satisfaction of any competent inspector at any time selected by the trustee to examine the same, and will cause all the rolling stock and equipment in replacement of any previously covered hereby to be transfered to the
187 Trust Company by proper bills of sales or other instruments of transfer and free of lien, and will cause to be marked on each side of every article of rolling stock and equipment held or acquired by the authority of the trustee under the terms and provisions and for the purposes of this indenture the words "Owned by Central Trust Company of New York, Trustee Louisville New Albany and Chicago Railway equipment Mortgage," and the proper number, and will not allow the name or designation of any other company as the owner to be placed on any such railroad equipment or rolling stock, and will immediately restore any such marks of ownership at any time destroyed, and will do such other acts as the Trust Company shall require for the full protection of the property and rights of the trustees and the holders of the bonds issued hereunder.

The Railway Company further agrees that it will through its hibit A to same.

general manager or other proper officer or agent furnish to the Trust Company yearly in the month of August during the continuance of this trust, or oftener if required by the Trust Company, a statement of all the equipment and rolling stock then in use by the Railway Company hereunder, with a special statement of the number and description of all such as shall have been destroyed and substituted during the year next preceding, and that the Trust Company shall have the right to inspect the said equipment and rolling stock as often as it shall desire during the continuance of this trust by any person appointed by the Trust Company, and that the Railway Company will provide the necessary means or the necessary authority to enable such persons to travel without
188 charge over the railroads on which any of such equipment or rolling stock may be, for the purpose of making such inspection.

The Railway Company further agrees that it will insure all the equipment and rolling stock at any time furnished for its use by the Trust Company as herein provided, (including all replacements thereof) as the property and for the benefit of the Trust Company, for such amounts as other similar railroad equipment and rolling stock are insured by the Railway Company, and will keep the said equipment and rolling stock so insured until the bonds hereby secured are fully paid, and will deposit the policies of insurance or certificates thereof with the Trust Company.

Article Eighth. If default shall be made in the payment of any semi-annual installment of interest mentioned in the said bonds, or any part thereof, according to the tenor and effect of said bonds, and the coupons for interest thereunto appertaining, and if such default shall continue for a period of six months, then the parties of the second part, or their successor or successors in the trust, may at their option, and upon being requested in writing by the holders of a majority in amount of the said bonds then outstanding shall declare the principal of all the said bonds to be immediately due and payable, and thereupon the principal of all of said bonds shall become due and payable forthwith, anything in said bonds contained to the contrary notwithstanding. Such declaration may be made by notice in writing to the party of the first part, or by publication thereof once in some daily newspaper published in the City of New York.

189 Article Ninth. If default shall be made in the payment of the principal or interest moneys mentioned in the said bonds or the

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coupons thereunto appertaining, or any or either of them, or any part thereof, according to the tenor and effect of said bonds and coupons, or either of them, and such default, if in payment of interest shall have continued for six months, or if default shall be made in the payment of the sinking fund hereinbefore provided to be paid for the purchase or redemption of said bonds, or some part of such sinking fund. and such default in payment of any sum required to be paid for said sinking fund shall have continued for six months, or if proceedings of any kind shall be commenced by or against the Railway Company for the appointment of a receiver, or for the foreclosure of any deed of trust or mortgage of the Railway Company, then, and in any such events, the parties of the second part may in their discretion, and upon being requested in writing by the holders of a majority in amount of the said bonds then outstanding, and upon being properly indemnified against costs and expenses which may be incurred by acting in pursuance of such request, shall forthwith do any or all of the things following, namely:

1. Enter into and upon and take and hold possession of all and singular the premises, estates, franchises, rights, privileges and property hereby granted and conveyed to the parties of the second part, or intended so to be, and in person, or by one or more agents, operate the said railways, making from time to time all such repairs or replacements as they may deem judicious, and all such useful alterations, additions and improvements as the income coming into their hands shall be adequate to pay for, and take, collect and receive all fares, freights, tolls, earnings, issues, profits and incomes of said railways and property, and apply such fares, freights, tolls, earnings, issues, profits and income to the proper expenses of holding and managing the said railways and other premises, and conducting the business thereof, and payment of and for any and all taxes, assessments, charges, rentals or such liens superior to the lien of these presents upon said premises as they may deem proper, and all necessary and proper repairs, replacements, alterations, additions and improvements upon said property, and all expenses, costs, charges and counsel fees in the premises of the said parties of the second part or their successors in trust, and a reasonable compensation for their services, and next to the payment of the interest and principal of the said bonds according to the tenor and effect thereof as the same may be or become due and payable; and, in case the principal moneys secured by said bonds shall not have become due, the moneys applicable to the payment of interest shall be applied upon the interest warrants remaining in default in the order of their maturity; and, in case the said principal moneys shall

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have become due, the moneys applicable to the payment of the principal and interest on such bonds shall be applied to the payment of such principal and interest pro rata without any preference or priority whatsoever.

191 2. After entry or without entry cause the whole of the said premises, estates, franchises, rights, privileges and property hereby granted and conveyed to the parties of the second part, or intended so to be, with their appurtenances, and all benefit and equity of redemption of the said party of the first part and its successors and assigns therein or thereto to be sold at public auction in the City of Indianapolis in the State of Indiana or in the City of New York, in the State of New York, giving at least three months previous notice of the time and place of such sale by publishing the same at least once in each week during such period of three months in two daily newspapers published in said City of New York and in two newspapers published in said City of Indianapolis, and giving such other notice of such sale as may be required by law, if any other notice be so required.

It shall be lawful for the said parties of the second part and
their successors making such sale, and they are hereby authorized
and empowered as the attorney or attorneys of the first part and
its successors, by these presents duly constituted and appointed for
that purpose, to make, execute and deliver to the purchaser or purchasers on such sale all such deeds and conveyances as shall be
necessary or proper to convey to and vest in him or them the said
premises, estates, franchises, rights, privileges and property, and
every part and parcel thereof, and all of the estate, right, title and
interests of the said party of the first part and its successors and
assigns therein or thereto, and such sale and the deeds and
192 conveyances so to be thereupon executed shall be valid and
effectual forever and shall be a perpetual bar both in law and
equity against the said party of the first part and its successors and
assigns, and against all persons claiming or to claim by, from or
under it or them, or any of them. The receipt of the trustees or
trustee who shall make the sale hereinbefore authorized shall be a
sufficient discharge to the purchaser or purchasers at such sale for
his or their purchase money, and such purchaser or purchasers, his
or their heirs or assigns or personal representatives, shall not, after
paying such purchase money and receiving such receipts of such
trustees or trustee thereof, be obliged to see to the application of
such purchase money upon or for the trusts or purposes of these
presents, or be in any wise answerable or any loss, misapplication

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or non-application of such purchase money by the trustees or trustee.

3. Proceed by the bill in equity or other proper proceeding in any court or courts of competent jurisdiction to foreclose this mortgage or enforce the rights, liens and securities of the trustees or trustee and the bondholders thereunder, and thereupon said trustees or trustee shall be entitled to have the said premises, estates, franchises, rights, privileges and property hereby granted or conveyed to them, or intended so to be, sold by judicial sale under the order or decree of such court or courts for or towards the satisfaction of the principal and interest due or owing upon them the then outstanding bonds issued under or entitled to
193 the benefit of the security of this mortgage, and for the enforcement of the rights, liens and securities of the trustees or trustee and bondholders.

4. Demand of the Railway Company and of any other person or corporation then having the same the immediate possession of any or all the existing equipment and rolling stock which shall have been furnished for the use of the Railway Company under the provisions of this deed of trust, including all replacements thereof, and with such force as may be necessary enter upon the railroad and other premises of the Railway Company and of any other person or corporation on whose premises the same may be, and take immediate and maintain exclusive possession of any or all of said equipment and rolling stock, and upon such retaking thereof hold and use or operate the same, or lease the same, or otherwise contract for the use thereof, making from time to time all proper repairs thereof and paying insurance, taxes and other necessary expenses connected therewith, and receive the earnings, rentals and profits thereof.

5. After such retaking, proceed with or without the order or decree of any court of equity or other competent court having jurisdiction in the premises, to sell any or all of said equipment or rolling stock at public sale in such lots or amounts, on such notice and at such times and at such places as the Trustees or Trustee or the court may determine, and adjourn any sale from time to time, and upon any such sale to transfer and deliver any property sold to the purchaser thereof by good and sufficient instruments of
194 transfer, but without liability to see to the application of the purchase money and without obligation to inquire into the necessity, expediency or authority of any such sale, which shall be a per-

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petual bar, both in law and equity, against the trustees and each of them, and their successors and assigns, or the successors and assigns of either of them, and against the Railway Company, and against all persons claiming under them or either of them.

Article Tenth. It is hereby expressly declared and agreed that the parties of the second part, or their successors in the said trust, shall, out of the proceeds of any sale made under the provisions of this indenture, whether by judicial proceedings or otherwise, in enforcement of the security afforded by these presents, in the first place pay and retain all costs and expenses attending such sale, and all counsel fees and other expenses incurred by them, or either of them, in reference to the same, and receive and retain a reasonable compensation for their own services in the premises, and also any balance which may be due to them or either of them on account of any disbursements or expenses paid or incurred in or about the care and management of the said premises subsequent to the taking possession thereof by them, or either of them, including the reasonable compensation of any agent or agents who may be employed in or about such care and management, and the rest of the proceeds of such sale, or so much thereof as may be necessary, shall be applied to the payment of the whole amount of principal and interest which shall then be
195 due and unpaid upon the bonds secured hereby, or any of
them, whether the said principal, by the tenor of the said bonds, be then due or yet to become due; and, in case of deficiency in such proceeds to pay in full the whole amount of principal and interest owing or unpaid upon the said bonds, they shall be paid ratably in proportion to the amounts owing and unpaid upon them respectively, and without discrimination as between principal and interest, and without preference of the holder of any bond or coupon over any of the others; and any surplus which may remain after the full payment of the principal and interest of all the said bonds shall be paid over to the said party of the first part, or its successors or assigns, upon lawful demand being made therefor.

Article Elevnth. It is expressly agreed by the Railway Company that in case of a retaking by the Trustees or Trustee of any of the equipment or rolling stock at any time furnished for the use of the Railway Company hereunder, or substituted for any so furnished, or in case the Trustees or Trustee shall demand the possession of the same under any of the agreements herein contained, then the Railway Company will without cost or charge to the

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Trustees or Trustee, or to those beneficially interested in the trust hereby created, cause every Railroad Company having the possession or use of any of said property from the Railway Company to draw forthwith in the usual manner and at the usual speed of freight trains the said equipment and rolling stock to such points or point on the railroad where the same may be as shall be
196 reasonably designated by the Trustees or Trustee, and that the Railway Company will draw said equipment and rolling stock from any points of connection with other railroads where the same may be to such point or points on any of its railroads as shall be reasonablly designated by the Trustees or Trustee, and that the Trustees or Trustee shall have the right, without expense to them or it, to keep and store said equipment and rolling stock upon any of the railroads or premises of the Railway Company until sold, as provided herein, and until a reasonable time for removal thereof, or until removed by Trustees or Trustee without sale.

Article Twelfth. The Railway Company further agrees that in case of any default on its part hereunder all the earnings of the said equipment and rolling stock at any time furnished for the use of the Railway Company by the Trutsees or Trustee as herein provided or substituted for any so furnished, shall then and thereafter be payable to the Trustees or Trustee and be applied by them or it as if received for the use thereof after a retaking under the provisions hereof, and the Railway Company agrees forthwith upon the said default to give notice to the Railroad Clearing House Association, and any railroad companies which at the time shall hold or owe any moneys for the service or use of the said equipment or rolling stock to pay over all such moneys to the Trustees or Trustee, and hereby authorized the Trustees or Trustee to receive the same and to give such notice with like
197 effect as if given by the Railway Company; it is agreed, however, that such notice shall not be necessary to enable the Trustees or Trustee to collect and receive such earnings in case of any such default.

Article Thirteenth. No bondholder or bondholders shall take, begin, institute or prosecute any proceeding or proceedings to enforce any of the provisions hereof, or to realize upon any of the security herein provided, or to foreclose this mortgage, until after he or they shall have requested the Trustees or Trustee, in writing, to take, begin or institute such proceeding or proceedings, and offered proper indemnity, as hereinbefore provided, and said

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Trustees or Trustee shall have the right to require the person or persons presenting any request mentioned or provided for in this mortgage to furnish proof, by affidavit or affidavits of the signers, as to the ownership of the bonds represented by him or them, and of his or their authority to subscribe such request, in case the same shall be subscribed by any other person than the owner; and, if such proof be so required by any other person than the owner; and, if such proof shall have been furnished to the Trustees or Trustee.

Article Fourteenth. The Railway Company agrees that, in case of any default upon its part hereunder, it will not set up, claim or seek to take advantage of any present or future valuation, stay, appraisement, redemption or extension law or laws which might prevent, hinder or delay the exercise by the Trustees
198 or Trustee of the right to retake possession of any of the
equipment or rolling stock mentioned or described herein, or covered hereby, or to operate, use, lease or otherwise contract to the use of the same, or to sell any of the property covered hereby or described herein, or which might prevent or delay the immediate enforcement or foreclosure of this indenture or the absolute sale and delivery of any of said property under any proceedings for the purpose, but hereby irrevocably waives the benefits of all such laws, and also hereby irrevocably waives all right to have any of the property covered hereby or described herein marshaled upon any foreclosure sale thereof, and consents that the same be sold either as a whole or in such lots or amounts as may be determined by the Trustees or Trustee, or by any court of competent jurisdiction in which foreclosure proceedings, with respect to such property, may be pending.

Article Fifteenth. It is agreed between the parties hereto that at any sale of any equipment and rolling stock hereinbefore mentioned, or at any sale of the premises or property herein conveyed to the trustees or trustee, whether made by the trustees or trustee or by judicial authority, the trustees or trustee may bide for and purchase any of the property so sold, or cause the same to bide for and purchased, and that, in the event of the purchase of any of said property by the trustees or trustee, the right and title thereto shall vest in said trustees or trustee, and any bondholder or bondholders may bide for and purchase any of the property so sold at any sale thereof.

Article Sixteenth. In case of any such sale as is herein

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199 authorized being made of the mortgaged premises and property or of the equipment and rolling stock hereinbefore mentioned, in enforcement of the lien hereby created, in the course of judicial proceedings or otherwise, the purchaser or purchasers at such sale shall be entitled, in making settlement for any payment of the purchase money bidden at such sale, to turn in or use towards the payment of such purchase money the bonds and coupons held by such purchaser or purchasers to or towards the payment whereof the net proceeds of such sale shall be legally applicable, reckoning such bonds and coupons, or the amounts so turned in or used of the same for such purpose, at such sum as would be payable out of the net proceeds of such sale to such purchaser or purchasers as holder or holders of such bonds and coupons for his or their just share or proportion of such net proceeds of sale upon due apportionment of and concerning such net proceeds. If the net proceeds of such sale be sufficient to extinguish such bonds and coupons so turned in or used, they shall be canceled by the person or persons making the sale; and, if such net proceeds shall suffice to make payment only or such bonds and coupons, due endorsement shall be made upon the same of the amount realized on account thereof, and said bonds and coupons so endorsed shall be returned to the holders.

Article Seventeenth. It is expressly agreed by and between the parties hereto that all the costs, charges and legal or other expenses necessary or incident to the acquiring by or conveyance or transfer to the Trust Company of any equipment or rolling stock under the provisions hereof shall be paid by the railway company, and that until all the payments provided for in this indenture, 200 and in the bonds issued hereunder, shall have been fully made by the railway company, and all the agreements on its part hereunder shall have been kept and performed, the title to the equipment and rolling stock acquired by means of the bonds issued hereunder in accordance with the provisions hereof shall not pass to or vest in the railway company, nor shall the railway company have any right in respect to said equipment and rolling stock, except that of using the same as provided in this indenture.

Article Eighteenth. While there shall be no existing default in the payment of the principal or interest of any of the said bonds secured hereby, or in the performance of any of the matters and things hereby required to be done or performed by the railway company, the railway company shall have the right to sell, lease and otherwise dispose of, free from the lien of this mortgage or deed of trust, any real or personal property conveyed to the trustees

Exhibit A to same.

or trustee in this indenture which may no longer be required by the railway company for the purposes of its incorporation, and the trustees or trustee shall have full power thereupon to release from the lien of this mortgage or deed of trust any property so sold, leased or otherwise disposed of. Any property which may be required for the use in substitution for any so released or conveyed shall thereupon become subject to the lien of this mortgage, and upon request of the trustees or trustee shall be conveyed to them or it by the railway company, its successors or assigns, upon the trusts of these presents. The affidavit of the president or other proper officer of the railway company to the effect that the property so sold, leased or disposed of is no longer required by the
201 railway company for the purposes of its incorporation, shall be sufficient evidence to the trustees or trustee of this fact, and the trustees or trustee shall not be liable to any persons or person by reason of any act done or performed under the provisions of this article in good faith.

Article Nineteenth. Said party of the first part, for itself its successors and assigns, doth hereby covenant, grant and agree to and with the said parties of the second part and their successors in the trust, and to and with the respective persons and corporations who or which shall at any time become holders of the said bonds hereby secured, or any of them, that the said party of the first part, its successors and assigns, shall and will at any time, and from time to time hereafter upon request, make, do, execute and deliver all such further and other acts, deeds and things as shall be reasonably advised, devised or required to effectuate the intention of these presents, and to assure and confirm to the said parties of the second part, or their successors, all and singular the property and estate, real and personal, hereinbefore described and hereby intended to be granted, and so as to render the same, and especially such portions thereof as shall be hereafter acquired by the said party of the first part or its successors, available for the security and satisfaction of the said bonds according to the intent and purpose herein expressed.

Article Twentieth. If the party of the first part, or its successors or assigns, shall well and truly pay, or cause to be paid, to the holders of the said bonds and coupons the principal and
202 interest moneys secured hereby when and as the same shall become due and payable, according to the terms, provisions, conditions, tenor and effect of the said bonds and coupons, then these presents and the estate hereby granted to the trustees or

Exhibit A to sam

trustee shall cease, determine and be null and void, and the parties of the second part, and their successors, agree that in that event all of the said equipment and rolling stock then owned and held by them under the provisions of this indenture shall forthwith become the property of the railway company, and the parties of the second part, or their successors, shall thereupon execute and deliver such proper instrument or instruments as shall be necessary to convey said equipment and rolling stock to the railway company and release the same from all liens created by this deed of trust or mortgage.

Article Twenty-First. It is expressly covenanted, agreed and declared by and between the parties hereto that the parties of the second part accept the trusts conferred upon them by these presents upon the understanding that they, said parties of the second part, and their successors in the trust, shall not, nor shall either of them, be liable or accountable for the acts, default or negligence of any agents or attorney who may be appointed by them or either of them under or by virtue of or for the purposes of these presents to do any of the matters or things herein provided for if such agent or agents or attorney be selected with reasonable care; nor shall either or any trustee hereunder be liable or accountable for any misconduct, negligence or default of any other trustee hereunder; nor shall said parties of the second part, or their successors in
203 the trust, incur any liability or responsibility whatever in consequence of allowing the Railway Company or any railroad company under it, through lease, contract or otherwise, to have or retain possession or use of the said equipment and rolling stock at any time furnished for the use of the Railway Company by the parties of the second part, or their successors in the trust, as herein provided; and that the parties of the second part and their successors in the trust shall not be liable for any destruction, deterioration, loss or damage to any of the property covered hereby or mentioned herein, or for anything whatsoever in connection with this trust except willful misconduct or gross negligence; and that the parties of the second part and their successors in the trust shall be personally liable for any debts contracted by them, for damages to persons or property carried or injured, or for salaries or non-fulfillment of contracts during any period while it or they shall manage the trust property or premises upon entry as aforesaid, but that such debts and liabilities shall be and constitute a first and paramount charge upon the trust funds and property. And in case the parties of the second part or their successors shall retake possession of any of the property covered hereby or mentioned herein, and shall use or

hibit A to same. operate the same, as herein provided, in addition to such indemnity as may be required under the terms hereof from the person or persons requesting them so to do, they shall be indemnified out of the moneys and property which shall come into their hands for all claims and demands against them.

Article Twenty-Second. The trustees under this mortgage, or either of them, and their successors in the trust, may at any time resign the trust hereby created by giving notice of such
204 resignation in writing to the party of the first part, or its successors. Any vacancy in the office of trustees or trustee hereunder, whether created by resignation or otherwise, may be permanently filled by the appointment of new trustees or a new trustee by an instrument or concurrent instruments in writing, executed under the hands and seals of the holders of a majority in interest of the bonds secured hereby, and then outstanding, or their attorneys in fact thereunto duly authorized; but the board of directors of the party of the first part, or its successors, may make a temporary appointment to fill such vacancy until a permanent appointment shall be made in the manner above provided. Any new trustees or new trustee appointed as aforesaid, whether by a permanent or temporary appointment, shall, upon its, his or their appointment, and without any other act, deed or conveyance, become and be vested with the estates, trusts, rights, powers and duties of the trustees or trustee in whose place it, he or they shall have been appointed; but, nevertheless, the respective parties hereto and their successors and assigns shall, and will upon request, make, and execute and deliver all such releases, conveyances and assurances as shall be appropriate to vest in and confirm and assure to such new trustees or new trustee such estates, trusts, rights, powers and duties according to the intent above expressed.

The trustees or trustee under this indenture shall receive just compensation for all services which they or either of them may render in connection with the trust, to be paid by the Railway Company, or out of the trust estate.

205 Article Twenty-Third. It is mutually agreed that the term or words the trustee or trustees, or the said trustee, or the said trustees, as used in this indenture, shall be held and construed to mean the trustees or trustee for the time being, whether original or new, and that all the covenants, stipulations, promises and agreements herein contained, by or on behalf of the party of the first part herein contained, by or on behalf of the party of the first

Exhibit A to same.

part hereto, shall be and are binding upon its successors and assigns, whether so expressed or not.

The parties of the second part hereby accept the trust conferred upon them by these presents.

In witness whereof, the said Louisville, New Albany and Chicago Railway Company, the said party of the first part, has caused these presents to be signed by its president and sealed with its corporate seal and attested by its secretary; and to testify their acceptance of the trusts hereby created the said Central Trust Company of New York has caused this instrument to be signed in its behalf by its vice-president, sealed with its corporate seal, and attested by its secretary, and the said James Murdock has hereunto affixed his hand and seal the day and year first above written.

LOUISVILLE, NEW ALABNY AND
CHICAGO RAILWAY COMPANY,
By SAMUEL THOMAS,
President.

Attest:
[SEAL.] W. H. LEWIS,
Secretary.

CENTRAL TRUST COMPANY OF NEW YORK,
By E. FRANCIS HYDE,
Second Vice-President.

Attest:
[SEAL.] C. H. P. BABCOCK,
Secretary.

JAMES MURDOCK. (Seal.)

STATE OF NEW YORK, }
COUNTY OF NEW YORK. } ss.

206 Be it remembered that on this 6th day of September, A. D. 1894, before me, a Notary Public residing in said State and Kings County, personally appeared Samuel Thomas, president of the Louisville, New Albany and Chicago Railway Company, personally known to me to be the president of said company, and personally known to me to be the real person whose name is subscribed to the foregoing instrument, and acknowledged that he, on behalf of said Railway Company, and by authority of its Board of Directors, had signed and delivered said instrument as the free and voluntary act of the said Railway Company for the uses and purposes therein set forth.

ibit A to same. In witness whereof, I have hereunto set my hand and affixed my official seal this 6th day of September, 1894.

[SEAL.]

JAMES J. MURPHY,
Notary Public, Kings Co.,
Cert. filed in N. Y. Co.

STATE OF ILLINOIS, }
COUNTY OF COOK. } ss.

Be it remembered that on this 8th day of September, A. D. 1894, before me a Notary Public, residing in said State and County, personally appeared W. H. Lewis, secretary of the Louisville, New Albany and Chicago Railway Company, personally known to me to be such secretary, and personally known to me to be the real person whose name is subscribed to the foregoing instrument, and acknowledged that he, on behalf of said Railway Company, and by authority of its Board of Directors, had signed the said instrument and affixed thereto the official corporate seal of said Railway Company as the free voluntary act of the said 207 Louisville, New Albany and Chicago Railway Company for the uses and purposes therein set forth; that he knew the corporate seal of said company, and that the seal so affixed is said corporate seal.

In witness whereof, I have hereunto set my hand and affixed my official seal this 8th day of September, 1894.

[SEAL.]

CHAS. E. BYRNE,
Notary Public.

STATE OF NEW YORK, }
CITY AND COUNTY OF NEW YORK. } ss.

Be it remembered, that on this 13th day of September, A. D. 1894, before me, a notary public residing in said State, city and county, personally appeared E. Francis Hyde, 2d Vice-President of the Central Trust Company of New York, personally known to me to be the 2d vice-president of said company and personally known to me to be the real person whose name is subscribed to the foregoing instrument, and acknowledged that he, on behalf of the said Trust Company, and by the authority of its board of trustees, had executed the said instrument as the free and voluntary act of the said Trust Company for the uses and purposes therein set forth.

Also personally appeared before me at the same time C. H. P. Babcock, Secretary of the said Trust Company, personally known to me be such secretary and personally known to me to be the real person whose name is subscribed to the foregoing instrument, and acknowledged that he, on behalf of the said Trust Company and by like authority, had signed the said instrument and affixed thereto the official seal of said Trust Company as the free and voluntary act of said Trust Company, for the uses and purposes therein set forth; that he knew the corporate seal so affixed is said corporate seal. **Exhibit A to same.**

208 In witness whereof, I have hereunto set my hand and affixed my official seal, this 13th day of September, 1894.

FRANK B. SMIDT,
[SEAL] Notary Public 289, N. Y. Co.

STATE OF OHIO, } ss.
COUNTY OF ALLEN. }

Be remembered that on this 11th day of September 1894, before me, a notary public residing in said State and county, personally appeared James Murdock, personally known to me to be the real person whose name is subscribed to the foregoing instrument, and acknowledged the execution of the same.

In witness whereof, I have hereunto set my hand and affixed my official seal, this 11th day of September, 1894.

JAS. W. HALFHILL,
[SEAL] Notary Public, Allen County, Ohio.

And afterwards, at the November term of said court, on the 21 day of December, 1896, before the Honorable William A. Woods, Judge of said court, the following further proceedings in the above entitled cause were had, to-wit:

And now on this 21 day of December, 1896, come the parties hereto, and thereupon, upon consent of the solicitors for the several parties, it is

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auses.

Ordered, that the above entitled cause be and the same is hereby consolidated with the consolidated suit now pending in this court, entitled The Farmers' Loan and Trust Company and John H. Barker, complainants, against Louisville, New Albany &
209 Chicago Railway Company and others, defendants, the same
to proceed under the title of The Farmers' Loan and Trust Company and John H. Barker, complainants, against the Louisville, New Albany & Chicago Railway Company, and others, defendants.

And afterwards, towit: at the November term of said court, on the 24 day of December, 1896, before the Honorable William A. Woods, Judge of said court, the following further proceedings in the above entitled cause were had, to-wit:

Now on motion of Messrs. Turner, McClure & Rolston, of counsel for the complainants herein.

It is ordered, that the complainants have and they hereby are given leave to file an amended and suppemental bill of complaint herein, which is now filed and is in the words following, to-wit:

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ill.

And now come the Farmers' Loan and Trust Company and John H. Barker, complainants herein, and, by leave of the court first had and obtained, file this, their amended and supplemental bill of complaint, against the defendants, the Louisville, New Albany and Chicago Railway Company, the Central Trust Company of New York, James Murdock and John H. Stotsenburg, and hereby repeating and expressly reaffirming all the allegations of the original bill filed herein, also alleged and set forth as follows:

First. The Olreans, West Baden and French Lick Springs Railway Company is a corporation duly created in or about the month of July, 1885, under the laws of the State of Indiana, holding the legal title to a line of railroad from French Lick to a junction with the line of the Louisville, New Albany and Chi-
210 cago Railway Company at Orleans, in the County of Orange,
in the State of Indiana, which road was constructed by funds raised from the sale of the bonds issued under the mortgage to your orators to foreclose which this suit is brought, and which

Amended and Supplemental Bill.

road, ever since the completion of the same, has been under the control, management and operation of the defendant, the Louisville, New Albany and Chicago Railway Company, which last named company is the owner of the entire stock of the said Orleans, West Baden and French Lick Springs Railway Company, which stock is subject to the lien of said consolidated mortgage.

On or about the 12th day of December, 1896, the said corporation, the Orleans, West Baden and French Lick Springs Railway Company, made and duly executed a certain instrument in writing in the way of a confirmatory mortgage or deed of trust to your orators, as further security for the bonds secured by said consolidated mortgage of the Louisville, New Albany and Chicago Railway Company, which said instrument in writing is in the words and figures set forth in a schedule hereto annexed, marked Exhibit "A," which is a copy of said instrument and to which your orators pray to refer as a part of this, their amended and supplemental bill of complaint herein.

Second. The Bedford and Bloomfield Railroad Company is a corporation duly created in or about the month of March, 1883, under the laws of the State of Indiana, holding the legal title to a line of railroad from Switz City, in the County of Green, in said State of Indiana, to a junction with the line of the Louisville, New Albany and Chicago Railway Company at Bedford in the County of Lawrence, in said State, which road was constructed as a narrow-gauge road and afterwards into a standard gauge road, by funds raised from the sale of the bonds issued under the mortgage to your orators to foreclose which this suit is brought, and which road, ever since the completion of the same, has been under the control, management and operation of the defendant, the Louisville, New Albany and Chicago Railway Company, which last named company is the owner of the entire stock of the said Bedford and Bloomfield Railroad Company, which stock is subject to the lien of said consolidated mortgage.

On or about the 12th day of December, 1896, the said corporation, the Bedford and Bloomfield Railroad, 1896, the said corporation, the Bedford and Bloomfield Railroad Company, made and duly executed a certain instrument in writing in the way of a confirmatory mortgage or deed of trust to your orators, as further security for the bonds secured by said consolidated mortgages of the Louisville, New Albany and Chicago Railway Company, which said instrument in writing is in the words and figures set

Amended and Supplemental Bill.

forth in a schedule hereto annexed, marked Exhibit "B" which is a copy of said instrument, and to which your orators pray to refer as a part of this, their amended and supplemental bill of complaint.

Wherefore your orators pray that they may have the benefit of the proceedings taken under said original bill of complaint, and that this bill may be taken as an amendment and as supplemntal thereto, and that they may have the same relief as they have in said original bill already prayed, and in addition thereto pray
212 that all the rights and franchises and all the property, real and personal, of the said Orleans, West Baden and French Lick Springs Railway Company and of the said Bedford and Bloomfield Railroad Company may be declared subject to the lien of said consolidated mortgage, and that the amount found due, as prayed in said original bill of complaiint, may be found to be the first lien on the property of said Orleans. West Baden and French Lick Springs Railway Company and said Bedford and Bloomfield Railroad Company, according to the terms of the said consolidated mortgage or deed of trust, and of said confirmatory deed bearing date December 12, 1896, made by the Orleans, West Baden and French Lick Springs Railway Company to your orators, the Farmers' Loan and Trust Company and John H. Barker, and, said confirmatory deed bearing date December 12, 1896, made by the Bedford and Bloomfield Railroad Company to your orators, the Farmers' Loan and Trust Company and John H. Barker, and that in default of the said defendant, the Louisville, New Albany and Chicago Railway Company, paying the amount found due upon the said consolidated mortgage bonds and the coupons thereto, for interest or principal or both, as in said original bill prayed, all the property and franchises of the Orleans, West Baden and French Lick Springs Railway Company and of the Bedford and Bloomfield Railroad Company may be sold under a decree of this court and according to law and the practice of this court to satisfy the amount so found due. And your orators further pray that the defendants and each of them may be directed to answer the matters alleged in this, their amended and supplemental bill of complaint, and that your orators may have such other and further
213 relief in the premises as may be just.

THE FARMERS' LOAN AND TRUST COMPANY,
By R. G. ROLSTON,
President.

Attest: E. S. MARSTON, Secretary.

TURNER, MCCLURE & ROLSTON, Solicitors for Complainant.
HERBERT B. TURNER. Of Counsel.

UNITED STATES OF AMERICA, }
SOUTHERN DISTRICT OF NEW YORK. } ss.

Amended and Supplemental Bill.

Roswell G. Rolston, being duly sworn, deposes and says, that he is the Farmers' Loan and Trust Company, one of the complainants above named, and has been such president for a number of years past; that he has read the foregoing amended and supplemental bill of complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein alleged upon information and belief, and as to those matters he believes it to be true; that this verification is not made by the said complainant because it is a corporation; that his knowledge is derived from having taken part in the transactions spoken of and from statements made to him, and from examination of the papers, and the same constitute his grounds of belief; that the seal affixed to the said amended and supplemental bill of complaint and was so affixed by its authority.

R. G. ROLSTON.

Sworn to before me this 22 day of December, 1896.
Notary Public No. 18,
New York County.

WM. B. CARDOZO.

214 EXHIBIT "A."

Exhibit A to same.

This Indenture, made and entered into on this 12th day of December, 1896, by and between the Orleans, West Baden and French Lick Springs Railway Company, hereinafter called Company, a corporation duly created and existing under the laws of the State of Indiana, party of the first part, and the Farmers' Loan and Trust Company, a corporation duly created and existing under the laws of the State of New York, and John H. Barker of the State of Indiana, hereinafter called trustees, parties of the second part:

Witnesseth: Whereas, said Company holds the legal title to a line of railroad from French Lick to a junction with the Louisville, New Albany & Chicago Railway Company at Orleans, in the County of Orange, in the State of Indiana:

And whereas, at a meeting of the Board of Directors of said Company duly and legally convened and held on the 11th day of hibit A to same. December, 1896, the said Board being fully authorized by law so to do did resolve as follows, to wit:

"Whereas, on the first day of January, 1886, the Louisville, New Albany & Chicago Railway Company executed its certain deed of trust to the Farmers' Loan and Trust Company, of New York, and John H. Barker, of Michigan City, Indiana, to secure certain bonds therein described:

And whereas, said bonds were duly issued and disposed of and part of the proceeds thereof were used for the construction of this Company's road from French Lick to Orleans, all in the County of Orange, in the State of Indiana:

215 And whereas, said road intersects with the railroad of the Louisville, New Albany & Chicago Railway Company at Orleans and since the completion of said road the same had been in the possession, control, management and operation of the Louisville, New Albany & Chicago Railway Company, said company being the owner of the entire stock issue of this Company:

And whereas, said Louisville, New Albany & Chicago Railway Company of date May 18, 1886, executed and duly acknowledged a further trust agreement collateral to said deed of trust for the purpose of providing further security to the bonds issued and to be issued under said original trust deed and to that end and for that purpose created a lien upon certain corporate stocks, which covers the entire stock of this company so owned by the Louisville, New Albany & Chicago Railway Company, as aforesaid, and

Inasmuch as this Company has no other debts or liabilities than its said stock debt and purposes and is willing for further and additional security to said bonds to vest the legal title to said road in trust in said trustees.

Now, therefore, and in consideration thereof, be it resolved: that John Greenough, vice-president of this company be and he is hereby authorized to convey by such form of conveyance as may be determined by counsel the railroad and all depots, sidetracks, terminals, roadbed, culverts, bridges, appurtenances, properties, rights, privileges and franchises, now owned and held by this company to the Farmers' Loan and Trust Company, of New York, and John H. Barker, of Michigan City, Indiana, in the same trust and sub-

Exhibit A to sa

ject to the same conditions and provisions as created and re-
216 cited in said original deed of trust and supplement thereto, and that said trustees shall hold under the conveyance made pursuant to this resolution the railroad, properties and franchises of this company as further security for the payment of said bonds in said trust deed and supplement thereto mentioned and described with the same force and effect as if the conveyance thereof to said trustees had been recited in the conveying clause therein and had been duly conveyed thereby, the corporate seal and its attestation being hereby expressly waived."

Now, therefore, this indenture witnesseth: that the Orleans, West Baden and French Lick Springs Railway Company, party of the first part, pursuant to said resolution and in consideration of the premises and of one dollar to it in hand paid, at and before the execution, acknowledgment and delivery of these presents, the receipt whereof acknowledged, hath granted, bargained, sold, assigned, set over, released, conveyed and confirmed and by these presents, does grant, bargain, sell, assign, set over, release, convey and confirm unto the Farmers' Loan and Trust Company and John H. Barker, as trustees, parties of the second part, and to the survivor of them and to their successor or successors in trust herein and hereby created and declared, all the railway of the party of the first part from French Lick to Orleans, Orange County, about seventeen miles in length, all being in the State of Indiana, together with all lands, rights of way, tracks, lines, rails, bridges, ways, buildings, structures, fences, fixtures, franchises, privileges and rights of the said Orleans, West Baden and French Lick Springs Railway Company, of every kind and nature what-
217 soever, all of which it is hereby covenanted shall issue by way of benefit and advantage to said trustees and by way of better and additional security, for the payment of the bonds issued under the deed of trust executed by the Louisville, New Albany & Chicago Railway Company, as stated, mentioned and set forth in the foregoing resolution.

It is further hereby mutually covenanted and agreed that the said railroad property and the title thereto hereby conveyed shall be held by said trustees and their successor and successors in trust for the uses and purposes herein expressed; that is to say:

First: All the property hereby conveyed shall be deemed to be a part and parcel of the property described in and intended to be conveyed by the said deed of trust of January 1st, 1886, and all

A to same. provisions of said deed of trust which apply in case of default to the property therein described and referred to shall apply with like and equal force and effect hereto, as if the property herein described had been herein specifically mentioned and conveyed.

Second. This instrument of conveyance is made subject to all the conditions and restrictions expressed and recited in said original deed of trust of date January 1st, 1886, and the acceptance hereof by said trustees shall have like force and effect as if the conveying clause herein contained had been recited therein.

In testimony whereof, the said Orleans, West Baden & French Lick Spring Railway Company has caused the execution hereof as directed by the foregoing resolution and the trustees have
218 caused the due acceptance of the trust created, on the day and year first above written.

THE ORLEANS, WEST BADEN & FRENCH
LICK SPRINGS RAILWAY COMPANY,
By (Sgd.) J. GREENOUGH,
Vice-President.
THE FARMERS' LOAN AND TRUST COMPANY,
By (Sgd.) E. S. MARSTON,
Secretary. (Seal.)

STATE OF NEW YORK. }
CITY AND COUNTY OF NEW YORK. } ss.

Be it remembered that on this 12th day of December, 1896, before me a commissioner of deeds for the State of Indiana, residing in said City, State and County, aforesaid, personally appeared John Greenough, Vice-President of the Orleans, West Baden & French Lick Springs Railway Company, personally known to me to be the Vice-President of said Company and personally known to me to be the real person whose name is subscribed to the foregoing instrument and acknowledged that he in behalf of said railway company and by authority of its Board of Directors has signed and delivered the said instrument as the free and voluntary act of said Railway Company for the uses and purposes therein set forth.

And also at the same time before me personally came Rosewell G. Rolston, President of the Farmers' Loan and Trust Company personally known to me to be the President of said Company, and personally known to me to be the real person whose name is subscribed to the foregoing instrument and acknowledged that he in behalf of said Trust Company and by authority of its Board of Directors, had signed and delivered the said instrument as the free and voluntary act of the said Trust Company, personally appeared Edwin S. Marston, secretary of said Trust 219 Company, personally known to me to be the secretary of said company, and personally known to me to be the real person whose name is subscribed to the foregoing instrument, and acknowledged that he in behalf of said Trust Company, and by like authority had signed the said instrument and affixed thereto the official seal of said Trust Company as the free and voluntary act of said Farmers' Loan and Trust Company for the uses and purpose therein set forth; that he knew the corporate seal of said company and that the seal so affixed is said corporate seal. Exhibit A to same.

In witness whereof, I have hereunto set my hand and affixed my official seal this 12th day of December, 1896.

[SEAL.] (Sgd.) EDWIN F. COREY,
Commissioner of Deeds for Indiana
in New York.

I hereby certify the above to be a true copy.

(Sgd.) J. A. HILTON,
Assistant Secretary.

EXHIBIT "B."

This indenture, made and entered into on this 12th day of December, 1896, by and between the Bedford & Bloomfield Railroad Company, hereafter called Company, a corporation duly created and existing under the laws of the State of Indiana, party of the first part, and The Farmers' Loan and Trust Company, a corporation duly created and existing under the laws of the State of New York, and John H. Barker, of the State of Indiana, hereinafter called trustees, parties of the second part. Exhibit B to same.

Witnesseth: Whereas, said company holds the legal title to a 220 line from Switz City, in the County of Green to a junction with the Louisville, New Albany & Chicago Railway Company, at Bedford, in the County of Lawrence, in the State of Indiana:

hibit B to same.

And whereas, at a meeting of the Board of Directors of said company duly and legally convened and held, on the 11th day of December, 1896, the said Board being fully authorized by law so to do, did resolve as follows; to-wit:

"Whereas, on the first day of January, 1886, the Louisville, New Albany & Chicago Railway Company executed its certain deed of trust to the Farmers' Loan and Trust Company, of New York, and John H. Barker, of Michigan City, Indiana, to secure certain bonds therein described;

And whereas, said road was constructed as a narrow guage and in its operation connected with the railroad of the Louisville, New Albany & Chicago Railway Company, at Bedford, and after its completion as such and since the day of April, 1896, the said road has been possessed, controlled, managed and operated by said Louisville, New Albany & Chicago Railway Company, it being the sole stock of this company:

And whereas, said Louisville, New Albany & Chicago Railway Company of date May 18, 1886, executed and duly acknowledged the further trust agreement collateral to said deed of trust for the purpose of providing further security for the bonds issued and to be issued under said original trust deed and to that end for that purpose created a lien upon certain corporate stocks which covers the entire stock of this company so owned by the Louisville, New Albany & Chicago Railway Company, as aforesaid:

221 And whereas, said Louisville, New Albany & Chicago Railway Company advanced the money necessary and requisite to convert the said narrow-gauge road into a standard gauge so that the same might unite and intersect with the road and tracks of said Louisville, New Albany & Chicago Railway at Bedford, and this company is indebted to said Louisville, New Albany & Chicago Railway Company therefor, and

Inasmuch as this company has no other debts or liabilities than as aforesaid and now proposes and is willing for the further and additional security of said bonds and for the purpose of fully paying and satisfying all debts due from this company to said Louisville, New Albany & Chicago Railway Company to vest the legal title to this company's road in trust in said trustees.

Now therefore, and in consideration thereof, be it resolved:

Exhibit B

that said Greenough, vice-president of this company, be and he is hereby authorized to convey by such form of conveyance as may be determined by counsel, the railroad, and all depots, side tracks, terminals, roadbed, culverts, bridges, appurtenances, properties, rights, privileges and franchises now owned and held by this company to the Farmers' Loan and Trust Company, of New York, and John H. Barker, of Michigan City, Indiana, in the same trust and subject to the same conditions and provisions as created and recited in said original deed of trust and supplement thereto, and that said trustees shall hold under the conveyance made pursuant to this resolution the railroad, properties and franchises of this company as further security for the payment of said bonds in said trust deed and supplement thereto mentioned and described with the same
222 force and effect as if the conveyance thereof to said trustees had been recited in the conveying clauses therein and had been duly conveyed thereby, the same to be executed by said Greenough as such vice-president, without the corporate seal, the said seal and its attestation being hereby expressly waived."

Now therefore, this indenture witnesseth: that the Bedford and Bloomfield Railroad Company, party of the first part, pursuant to said resolution and in consideration of the premises and of one dollar to it in hand paid at and before the execution, acknowledgment and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, assigned, set over, released, conveyed and confirmed and by these presents does grant, bargain, sell, assign, set over, release, convey and confirm unto the Farmers' Loan and Trust Company and John H. Barker, as trustees, parties of the second part, and to the survivor of them and to their successor or successors in trust herein and hereby created and declared, all the railway of the party of the first part, from Switz City in Green County to Bedford in Lawrence County, about forty-one miles in length, all being in the State of Indiana, together with all the lands, rights of way, tracks, lines, rails, bridges, ways, buildings, structures, fences, fixtures, franchises and privileges and rights of the said Bedford and Bloomfield Railroad Company, of every kind and nature whatsoever, all of which it is hereby covenanted shall inure by way of benefit and advantage to said trustee and by way of better and additional security, for the payment of the bonds issued under the deed of trust executed by Louisville, New Albany & Chicago Railway Company, as stated, mentioned and set forth in the foregoing resolution.

223 It is further hereby mutually covenanted and agreed that the said railroad and property and title thereto hereby conveyed

ibit B to same.

shall be held by said trustees and their successor and successors in trust for the uses and purposes herein expressed; that is to say:

First. All the property hereby conveyed shall be deemed to be a part and parcel of the property described in and intended to be conveyed by the said deed of trust of January 1st, 1886, and all provisions of said deed of trust which apply in case of default to the property therein described and referred to shall apply like and equal force and effect hereto as if the property herein described had been therein specifically mentioned and conveyed.

Second. This instrument of conveyance is made subject to all the conditions and restrictions expressed and recited in said original deed of trust of date January 1st, 1886, and the acceptance hereof by said trustees shall have like force and effect as if the Habendum clause herein contained had been recited therein.

In testimony whereof, the said Bedford and Bloomfield Railroad Company has caused the execution hereof as directed by the foregoing resolution and the trustees have caused the due acceptance of the trust herein created, on the day and year first above written.

THE BEDFORD & BLOOMFIELD R. R. CO.,
By (Sgd) J. GREENOUGH,
Vice-President.
THE FARMERS' LOAN AND TRUST CO.,
By (Sgd) R. G. ROLSTON.
224 President.

Attest: (Seal.)
(Sgd) E. S. MARSTON,
Secretary.

STATE OF NEW YORK, }
CITY AND COUNTY OF NEW YORK. } ss.

Be it remembered, that on this 12th day of December, 1896, before me a commissioner of deeds for the State of Indiana, residing in said city, State and county aforesaid, personally appeared John Greenough, Vice-President of the Bedford and Bloomfield Railroad Company, personally known to me be the Vice-President of said company and personally known to me to be the real person whose name is subscribed to the foregoing instrument and acknowledged that he in behalf of said Railroad Company and by authority of its board of directors has signed and delivered the said instrument as the free and voluntary act of said railroad company for the uses and purposes therein set forth; and also at the same time personally came Rosewell G. Rolston, President of the Farmers' Loan and Trust Company, personally known to me to be the president of said company, and personally known to me to be the real person whose name is subscribed to the foregoing instrument, and acknowledged that he in behalf of said Trust Company and by authority of its board of directors, has signed and delivered the said instrument as the free and voluntary act of the said Trust Company, for the uses and purposes therein set forth; and also personally appeared before me at the same time Edwin 225 S. Marston, Secretary of said Trust Company, personally known to me to be the secretary of said company, and personally known to me to be the real person whose name is subscribed to the foregoing instrument and acknowledged that he on behalf of said Trust Company, and by like authority had signed the said instrument, and affixed thereto the official seal of said Trust Company as the free and voluntary act of said Farmers' Loan & Trust Company for the uses and purposes therein set forth; that he knew the corporate seal of said company, and that the seal so affixed is said corporate seal.

Exhibit B to sa

In witness whereof, I have hereunto set my hand and affixed my official seal, this 12th day of December, 1896.

(Sgd) EDWIN F. COREY,
[SEAL] Commissioner for Indiana, in New York.

I hereby certify the above to be a true copy.

J. A. HILTO.
Assistant Secretary.

And at the same time on said 24 day of December, 1896, before Honorable William A. Woods, Judge of said court, the following further proceedings in the above entitled cause were had, to-wit:

Petition of Receiver to pay interest coupons.

Comes now the Receiver, by counsel, and files his petition for authority to pay interest coupons due January 1, 1897, in the words following, to-wit:

Your petitioner, as receiver of the railroad property, etc., of the Louisville, New Albany & Chicago Railway Company, respectfully represents:

That the bills of complaint filed in the above entitled cause
226 are to foreclose certain junior mortgages therein mentioned
and described, subject to two certain deeds of trust, to-wit:
One deed of trust dated July 1st, 1880, executed by the Louisville, New Albany & Chicago Railway Company to John C. New and Washington C. DePauw, trustees, to secure bonds in the sum of three millions dollars, bearing interest at the rate of six per cent. per annum, payable semi-annually on the first days of January and July in each year, and that said deed of trust constitutes a first lien upon the railroad property and franchises therein described, to-wit. upon the railroad of the Louisville, New Albany & Chicago Railway Company, between the City of New Albany in the State of Indiana and Michigan City in the State of Indiana, the same being 188 miles in length. The other deed of trust was executed by the Louisville, New Albany & Chicago Railway Company to John C. New, as trustee, of date August 10, 1881, to secure bonds to be issued thereunder in the aggregate sum of two million three hundred thousand dollars, bearing interest at the rate of six per cent. per annum, payable semi-annually on the first days of February and August in each year, which becomes a first lien upon the Indianapolis Division of the Louisville, New Albany & Chicago Railway Company, as in said deed of trust provided and is more particularly and specifically described; that the interest upon said bonds secured by said two first trust deeds has been promptly paid as the same matured.

That the semi-annual payment of interest upon the first trust deed above mentioned due January 1st, 1897, is $90,000; that at that date there will be sufficient moneys in the hands of your petitioner as such receiver to pay the same and thus prevent a default;
that according to the estimate of earnings from this date to
227 February 1, 1897, there should be in the hands of your peti-
tioner as receiver, a sufficient sum to pay and meet the semi-
annual interest upon the bonds issued under said second trust deed,

Petition of Re-ceiver to pay interest coup

which falls due on said first day of February, 1897; that your petitioner believes that it will be to the best interest of all parties that the interest should be paid upon the said outstanding bonds secured by both of said trust deeds as the same matures. That heretofore said interest has been paid in the following manner, to-wit: The total amount of the interest installment has been deposited on or before the date of the maturity of said interest in the Chase National Bank in the City of New York, and upon the presentation of the coupons by the holders thereof at said bank, said bank has paid the same and canceled the coupons, returning the same to the treasurer of the Louisville, New Albany & Chicago Railway Company.

Your petitioner as such receiver therefor submits the aforesaid and recommends and prays that an order be entered hereon authorizing your petitioner as such receiver to pay such interest upon all the outstanding bonds secured by said two first trust deeds as the same mature from time to time according to the tenor and effect thereof, with further authority to deposit the amount of each installment of interest as the same matures in the Chase National Bank in the City of New York, to be used by said bank in the payment of said interest coupons as the same may be presented from time to time.

Respectfully submitted,
Wm. H. McDoel,
Receiver, Louisville, New Albany &
Chicago Railway Company.

E. C. Field,
Attorney for Receiver.

228 And at the same time, on said 24 day of December 1896, before Honorable William A. Woods judge of said court, the following further proceedings in the above entitled cause were had, to-wit:

Order upon sa

Upon the petition and recommendation of Wm. H. McDoel, receiver in the above entitled cause, and the court being fully advised in the premises, orders and directs said receiver, out of the earnings now in his hands or that may come into his hands from the operation of the railroad and property of the Louisville, New Albany & Chicago Railway Company, to pay the interest coupon due January 1st, 1897, upon the bonds secured by the deed of trust der upon same.

of date July 1st, 1880, in said petition and recommendation and likewise to pay the interest coupon due Febuary 1st, 1897, upon the bonds secured by the deed of trust of date August 10, 1881, being the interest upon said bonds secured by the two first trust deeds as in said petition and recommendation is more fully and particularly described.

In making said payments said receiver is authorized to deposit the aggregate amount thereof in the Chase National Bank in the City of New York, with due and sufficient authority to said bank to pay said interest, as the coupons evidencing the same are presented by the holders thereof and a receipt from the said Chase National Bank of such payment by said receiver for that purpose shall be sufficient voucher therefore.

229 And afterwards, to-wit: at the November Term of said court on the 13 day of January, 1897, before the Honorable William A. Woods, judge of said court, the following further proceedings in the above entitled cause were had, to-wit:

Now on motion of Turner, McClure & Rolston, counsel for the complainants herein, the Farmers' Loan and Trust Company and John H. Barker, and after hearing counsel for the said complainants and G. W. Kretzinger representing the defendant herein, the Louisville, New Albany and Chicago Railway Company and G. W. Kretzinger representing the Orleans, West Baden and French Lick Springs Railway Company, and upon the consent of all said parties.

der making
v defendants

It is hereby ordered, adjudged and decreed, that the said Orleans, West Baden and French Lick Springs Railway Company and the Bedford and Bloomfield Railroad Company be and the same are hereby made parties defendant in this consolidated cause, as fully as if they had been designated such defendants in the original bill of complaint and in the amended and supplemental bill of complaint herein of said complainants, and the said Orleans, West Baden and French Lick Springs Railway Company and the Bedford and Bloomfield Railroad Company are hereby directed to appear and answer herein within twenty days from the date hereof.

And afterwards, to-wit: at the November Term of said court on the 15 day of January, 1897, in recess of said court, the following further proceedings in the above entitled cause were had, to-wit:

Comes now the receiver by counsel and files his petition to institute condemnation proceedings, &c., which petition is in the words following, to-wit:

230 IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

The Farmers' Loan and Trust Company and John H. Barker, Complainants,
vs.
Louisville, New Albany & Chicago Railway Company, et al.
} Petition.

Petition of Re- ceiver to in tute conden tion procee ings.

William H. McDoel, receiver in the above entitled cause represents to the court that heretofore to-wit, he filed a petition as receiver herein therein praying among other things for authority to make a new alignment of track at certain points, for the purposes and to effect the results in said petition set forth; that thereupon this court entered an order fully authorizing petitioner so to do; that in making said new alignment of track it will be necessary at some point to secure a new location therefor; that any new location required out of the right of way now owned by the Louisville, New Albany & Chicago Railway Company whereon the present tracks are laid will be within a short distance of such present occupied right of way, and will be in all cases on the same tracts or subdivisions of lands over which the present right of way and tracks thereon pass; that your petitioner is unable to agree with some of the owners of some of the tracts over which the new locations will be necessary to properly affect and make such new alignment; that your petitioner believes he may be able to use such parts of the present right of way as may be abandoned in exchange for right of way for such new location or alignment, or to reduce damages for the taking of such new locations by condemnation, provided your petitioner had authority from this honorable court to use or release said portions of said old rights of way for that purpose.

Petition of Receiver to institute condemnation proceedings.

231 Your petitioner therefore prays that an order be entered herein authorizing your petitioner to institute in his own name as such receiver or in the name of the Louisville, New Albany & Chicago Railway Company for the use of the estate now held by your petitioner as such receiver, such condemnation proceedings as may be necessary to execute and perform the order authorizing such new location or alignment, and that your petitioner have authority to use such portions of the right of way abandoned for such new alignment in payment for such new rights of way or to reduce the damages therefor, with full authoirty to release or convey the same for that purpose.

Wm. H. McDoel,
Receiver, Louisville, New Albany and
Chicago Railway Co.

G. W. Kretzinger,
Atty. for Receiver.

And at the same time, on said 15 day of January, 1897, before Honorable William A. Woods, Judge of said court, the following further proceedings in the above entitled cause were had, to-wit:

Order upon same.

Comes now William H. McDoel, Receiver in the above entitled cause and presents his petition praying for an order authorizing him to institute in his own name, as such receiver, or in the name of the Louisville, New Albany & Chicago Railway Company for the use of the estate held by as such receiver, such condemnation proceedings as may be necessary to make the new alignment of tracks pursuant to and as authorized by an order entered in the above cause of date November . . . . , 1896; and after reading the petition and being fully advised it is ordered that William H. McDoel, as such receiver be and he is hereby authorized to bring and institute any condemnation proceedings in the County of Lake and State of Indiana, in his own name or in the name
232 of the Louisville, New Albany & Chicago Railway Company
for the use of the estate held by him as such receiver that may be deemed necessary to secure rights of way for making the new alignment of track in the vicinity of Lowell and Cedar Lake as heretofore authorized. Said petitioner is further authorized to use and for that purpose release or quit claim such portions of the present right of way that will be abandoned by such new alignment to secure new locations or rights of way for the purposes aforesaid and such new rights of way when so obtained shall inure to the benefit of the estate.

And afterwards, to-wit: at the November term of said court on the 19 day of January, 1897, before the Honorable William A. Woods, Judge of said court, the following further proceedings in the above entitled cause were had, to-wit:

Come now the defendants, the Louisville, New Albany & Chicago Railway Company, the Orleans, West Baden & French Lick Springs Railway Company, and the Bedford & Bloomfield Railroad Company, by G. W. Kretzinger, their solicitor, and file their answer to the bills herein in the words following, to-wit:

233 CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

The Farmers' Loan and Trust Company and John H. Barker, as Trustees,
Complainants,
vs.
Louisvile, New Albany and Chicago Railway Company, The Orleans, West Baden and French Lick Springs Railway Company and the Bedford and Bloomfield Railroad Company, et al,
Defendants.
} Answer.

And now come the Louisville, New Albany & Chicago Railway Company, the Olreans, West Baden and French Lick Springs Railway Company and the Bedford and Bloomfield Railroad Company, defendants in the above entitled cause and consolidated causes, and for answer to the bills of complaint, to-wit; one filed by the Central Trust Company of New York and John H. Stotsenburg, as trustees, against the Louisville, New Albany & Chicago Railway Company; one filed by the Central Trust Company of New York and James Murdock, as trustees, against the Louisville, New Albany & Chicago Railway Company; one filed by the Farmers' Loan and Trust Company and John H. Barker, as trustees, against the Louisville, New Albany & Chicago Railway Company and others, and an amended and supplemental bill filed by the Farmers' Loan and Trust Company and John H. Barker, as trustees, against the Louisville, New Albany & Chicago Railway Company, the Orleans, West Baden and French Lick Springs Railway Company and the Bedford and Bloomfield Railroad Com- Answers.

Answers.

pany, et al, to foreclose the mortgages therein mentioned, all 234 of which causes were consolidated into one suit under the above title, to-wit, The Farmers' Loan and Trust Company and John H. Barker, as trustees, against the Louisville, New Albany & Chicago Railway Company, and others; answering say:

1. These defendants, the Louisville, New Albany & Chicago Railway Company, the Orleans, West Baden and French Lick Springs Railway Company and the Bedford and Bloomfield Railroad Company admit that the complainants in said bills and in said amended and supplemental bill were authorized to accept and execute the trusts in the several mortgages mentioned as they have severally alleged.

2. Admit that the Louisville, New Albany & Chicago Railway Company, the Olreans, West Baden and French Lick Springs Railway Company and the Bedford and Bloomfield Railroad Company are existing corporations and had full corporate power to execute the several deeds of trust in the above pleadings mentioned and as averred therein.

3. Admit that the several deeds of trust mentioned in the above bills and supplement thereto were duly executed by these defendants in the manner and for the purpose in said pleadings alleged and that the same became security for the payment of the bonds to be severally issued thereunder upon the properties, railroads and franchises in such several deeds of trust mentioned, and as averred in said bills and supplement.

4. That bonds were issued under said several trust deeds in the number and amount and upon the terms and conditions set forth in said bills and supplement.

235 5. Admit that there were outstanding bonds issued under said several deeds of trust which are secured thereby in the number and amount alleged in said bills and supplement:

6. Admit that the defendant, the Louisville, New Albany & Chicago Railway Company has made default in the payment of interest upon said several series of bonds in the manner, for the period and in the amount alleged in said bills and supplement, as averred:

7. Admit that William H. McDoel was appointed receiver of

Answers.

the railroads and all the properties of these defendants at the date and in the suit alleged, and that he entered into the immediate possession thereof and now holds and operates the same, and that his receivership has been extended to these foreclosure suits as averred:

8. The defendant, the Louisville, New Albany & Chicago Railway Company admits that as averred it is and was at the date of the appointment of the receiver unable to pay all debts asserted and held against it:

9. Admit that the lines of railway and properties in said bills and supplement described have been used and operated as a single system of railroad under one management and defendants aver that this system extends through the State of Indiana and is operated into the State of Kentucky and Illinois for the conduct of interstate business; and avers that the partition of said properties and system into different and independent lines either for operation or by sale under decree foreclosing the deeds of trust covering
236 the entire system if made in parcels would greatly depreciate
the value thereof and would bring great loss to the lien holders:

10. These defendants neither admit nor deny any other averment contained in said original bill and supplement, and if the same are material these defendants leave complainants therein to make proof thereof, as this Honorable Court may require:

And these defendants having answered all that it is necessary or material for them to make answer unto, as they are advised by counsel, ask to be hence dismissed with their reasonable costs in this behalf expended.

G. W. Kretzinger,
Solicitor for Defendants.

And afterwards, to-wit: at the November term of said court, on the 23 day of January, 1897, before the Honorable William A. Woods, Judge of said court, the following further proceedings in the above entitled cause were had, to-wit:

Come now the Central Trust Company and John H. Stotsenburg by counsel and file their answer herein in the words following, to-wit:

swers.

And come also the Central Trust Company and James Murdock by counsel and file their answer herein in the words following, to-wit:

Now come the defendants, the Central Trust Company of New York, and John H. Stotsenburg, trustees, and The Central Trust Company and James Murdock, trustees, and answering the bill of complaint and the amended and supplemental bill of complaint of the complainants, the Farmers' Loan and Trust Company and John H. Barker, admit the truth of the several allegations con-
237 tained in said bill and amended and supplemental bill, and pray that the court may render such judgment on decree as may be just and equitable.

Central Trust Company of New York, and
John H. Stotsenburg, and
Central Trust Company of New York, and
James Murdock,
By Butler, Notman, Joline & Mynderse.
Floy A. Woods,
.Solicitors.

And at the same time, on said 23 day of January, 1897, before the Honorable William A. Woods, Judge of said court, the following further proceedings in the above entitled cause were had, to-wit:

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This day came the Louisville Trust Company, by St. John Boyle, its counsel, and by leave of Court files its intervening petition herein; also comes the Kentucky National Bank by Alexander P. Humphrey, its counsel, and files by leave of court its intervening petition herein; and upon consideration thereof, it is

Ordered, that the said Louisville Trust Company and the said Kentucky National Bank be and they are hereby admitted to appear in the proceedings in this case, each in its own behalf.

Said intervening petition is in the words following, to-wit:

The Louisville Trust Company by leave of court presents this its intervening petition, and respectfully sets forth that it is a corporation created and existing under and by virtue of the laws of the

Intervening Petition of Louisville Trust Co.

State of Kentucky, with authority to hold, acquire, possess and dispose of real and personal property of all kinds, to sue and be sued, and to enjoy, and possess all rights and privileges incident to corporations.

238 The petitioner alleges that heretofore the defendant, the Louisville, New Albany and Chicago Railway Company made and executed its guarantee, and endorsed the same thereon, on a certain issue of negotiable bonds which were made and executed and issued by the Richmond, Nicholasville, Irvine and Beattyville Railroad Company, a corporation thereto duly authorized by the terms of which guarantee the said Louisville, New Albany and Chicago Railway Company guaranteed that the said above named Beattyville Railroad Company would pay the principal and interest of the said bonds according to the tenor thereof, and which said guarantee was duly executed under the corporate seal of said Louisville, New Albany and Chicago Railway Company; and the said Beattyville Railroad Company by its said bonds, undertook and agreed to pay to the bearer thereof the amount of money therein named, with interest thereon at the rate of six per cent. per annum, payable semi-annually, and each of which said bonds was for the principal sum of one thousand dollars ($1,000.)

The petitioner says that it is the owner and holder of one hundred and twenty-five (125) of the said issue of the bond of one thousand dollars ($1,000) each, and upon each of which there is endorsed the said guarantee by the said Louisville, New Albany and Chicago Railway Company, and that no part of the said bonds has been paid, nor has any interest been paid thereon since January first, 1891, but the whole remains due and unpaid.

Petitioner says that the said Louisville, New Albany and Chi-
239 cago Railway Company is a corporation created and existing under and by virtue of the laws of the State of Indiana, and also of the State of Kentucky and by the laws of each of said States was duly authorized to make, and execute the guarantee aforesaid, and that its right and power to do the same has been so adjudged and decreed in a suit brought by the said Louisville, New Albany and Chicago Railway Company against the Ohio Valley Improvement Company in the Circuit Court of the United States for the District of Kentucky and which said judgment is in full force and unreversed.

And your petitioner says that by reason of the premises the

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said Louisville, New Albany and Chicago Railway Company is indebted to it as aforesaid in the sum of one hundred and twenty-five thousand dollars ($125,000) with interest thereon from January first, 1891, and that the said bonds were payable —— years after date, but payment thereof was secured by a mortgage subject to which the said bonds were issued, and under and in accordance with the provisions thereof the principal of said bonds have become long since due and payable.

Wherefore your petitioner prays that this petition be allowed to be filed and that an order be entered herein authorizing your petitioner to appear in his own behalf and in behalf of all others holding similar claims and take such steps and proceedings as it may be advised by counsel.

And your petitioner prays for all other and such further orders as may be meet and proper.

St. John Boyle,
Atty.

240 And at the same time, on said 23 day of January, 1897, before Honorable William A. Woods, judge of said court, the following further proceedings in the above entitled cause were had, to-wit:

ecree.

This consolidated cause came on to be heard at this term upon the bill of complaint of the complainants the Farmers' Loan and Trust Company and John H. Barker, and the amended and supplemental bill of complaint of said complainants, and upon the bill of complaint of the complainants the Central Trust Company of New York and John H. Stotsenburg, and upon the bill of complaint of the complainants Central Trust Company of New York and James Murdock, and upon the exhibits to said several bills and upon the answers of the defendants thereto, and upon the several orders, papers and proceedings in this cause, and was argued by counsel, and thereupon, upon consideration thereof, it was found by the court that all and singular the material allegations of the bills are true as therein alleged and the equity of this cause is with the complainants in said several bills; and it was

Ordered, adjudged and decreed, that the mortgage set forth in the bill of complaint herein of the complainants the Farmers'

Decrre.

Loan and Trust Company and John H. Barker made by the defendant the Louisville, New Albany and Chicago Railway Company to said complainants, and bearing date the 1st day of January, 1886, is a valid and subsisting mortgage and constitutes a lien upon the mortgaged premises, property and franchises which are described in said mortgage as follows (the words "party of the first part" being used to designate the said defendant Louisville, New Albany and Chicago Railway Company):

"All the railway of the party of the first part in the City of Louisville, in the State of Kentucky, and extending from New Albany, on the Ohio river, to Michigan City in the State of Indiana, and from the City of Chicago, in the State of Illinois, to the Indiana State line, under a leasehold right, and from said State line to the City of Indianapolis, in the State of Indiana, including the railway lying and being in all of said cities, and terminal rights and facilities and approaches thereto, the same being about four hundred and seventy-five miles in length, and running through the Counties of Floyd, Clark, Washington, Orange, Lawrence, Monroe, Owen, Putnam, Montgomery, Tippecanoe, White, Pulaski, Stark, Laport, Marion, Hamilton, Boone, Clinton, Carroll, Jasper, Newton and Lake, in said State of Indiana, and Jefferson County in said State of Kentucky, and Cook County in said State of Illinois, and also all branches thereof, including all the property of every sort or nature now owned by said Railway Company, and all that it may in the future acquire for the purposes and connected with or appertaining to the railroads or railways above mentioned and described, 241 together with all the lands, tracks, lines, rails, bridges, ways, buildings, piers, wharves, structures, erections. fences, walls, fixtures, franchises, privileges and rights of the railway company, and also all locomotives, engines, tenders, cars, carriages, tools, machinery, manufactured and unmanufactured materials, coal, wood and supplies of every kind, belonging or appertaining to the railway company, also all the tolls, incomes, issues and profits, arising out of the said property, and all rights to receive and recover the same, also all estate, right, title and interest of the party of the first, in and to any and all real estate belonging to the said party of the first part, also all leasehold lands, with the buildings thereon erected, it being the true intent and meaning of these presents, that the said Railway Company shall and doth convey to the said Trustees, all and all manner of franchises of every kind and description, however derived and wherever situate, all and all manner of real estate or interest therein, wherever such real estate may be situate, and all and all manner of personal property, of whatever nature or description the same may be, at the date of these presents owned or possessed by the said railway company, or which may at any time hereafter during the continuance of this trust be acquired by the said railway company for purposes connected with or appertaining to the railroads or railways above mentioned or described; and also all choses in action, of every kind and description, including bills receivable, book accounts, traffic balances, all books of record and all accounts of every kind and description, all papers, maps, inventories and documeuts in any wise referring or relating to the property or franchises hereby conveyed; and also all franchises and property and all personal rights or interest in any franchises or property of every kind or description, real, personal or mixed, and wherever the same may be situate, that may at any time, before or after the date of this indenture, be acquired by or for the said Railway Company, for purposes connected with or appertaining to said railroad or railways; all of which it is hereby covenanted shall inure by way of accretion to the benefit and advantage of said Trustees, and by way of further and better security."

That said mortgage also constitutes a first lien upon 9,999 shares of the capital stock of the Chicago and Western Indiana Railroad Company, of the par value of $100 each; 2,399 shares of the capital stock of the Belt Railway Company, of Chicago, of the par value of $100 each; 11,990 shares of the capital stock of the Bedford and Bloomfield Company, of the par value of $50 each; and 2,990 shares of the Orleans, West Baden and French Lick Springs Railway Company, of the par value of $100 each; all which said corporate shares have been deposited with and are held by The Farmers' Loan and Trust Company, one of said complainants, as trustee under the said Mortgage of January 1st, 1886, under and by virtue of a certain collateral trust agreement dated May 18, 1886, whereby said corporate shares are deposited and pledged as further security for the bonds issued under the said mortgage of January 1st, 1886.

It was also further ordered, adjudged and decreed that the lien of said mortgage dated January 1st, 1886, is subsequent and subsidiary to the liens of two other prior mortgages made by said defendant Railway Company; namely, a mortgage dated July 1st, 1880, made to John C. New and Washington C. DePauw, as trustees, covering a portion of the above-described premises, and a mortgage dated August 10th, 1881, and to John C. New, as trustee, covering another portion of the above-described premises; Decree.

but the lien of the said mortgage dated January 1st, 1886,
242 made to said complainants herein as aforesaid, is prior to any
other lien upon the property of said defendant Railway Company in favor of any party to this cause, except as herein stated.

It was also further ordered, adjudged and decreed that, as further security for the bonds secured by said mortgage dated January 1st, 1886, the defendant, The Orleans, West Baden and French Lick Springs Railway Company (the said corporation whose stock was owned by the defendant, Louisville, New Albany and Chicago Railway Company and was expressly pledged as further security, as aforesaid, for the bonds issued under said mortgage of January 1st, 1886), on or about December 12th, 1896, made and duly executed a certain instrument in writing in the way of a confirmatory mortgage or deed of trust to said complainants as trustees of and under said mortgage of January 1st, 1886, and therein and thereby granted and conveyed to said complainants, as such trustees, all the railway of said Orleans, West Baden and French Lick Springs Railway Company from French Lick to Orleans, Orange County, about 17 miles in length, all being in the State of Indiana, together with all lands, rights of way, tracks, lines, rails, bridges, ways, buildings, structures, fences, fixtures, franchises, privileges and rights of the said Orleans, West Baden and French Lick Springs Railway Company, of every kind and nature whatsoever, it being in said conveyance covenanted that said premises and property should inure by way of benefit and advantage to said trustees, and by way of better and additional security for the payment of the bonds issued under said mortgage dated January 1st, 1886; and that thereby all the said property included in said conveyance of December 12th, 1896, became and was and now is part and parcel of the property covered by said mortgage of January 1st, 1886.

It was also further ordered, adjudged and decreed that as further security for the bonds secured by said mortgage dated January 1st, 1886, the defendant The Bedford and Bloomfield Railroad Company (the said corporation whose stock was owned by the defendant Louisville, New Albany and Chicago Railway Company and was expressly pledged as further security, as aforesaid, for the bonds issued under said mortgage of January 1, 1886), on or about December 12th, 1896, made and duly executed a certain instrument in writing in the way of a confirmatory mortgage or deed of trust

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to said complainants as trustees of and under said mortgage of January 1st, 1886, and therein and thereby granted and conveyed unto said complainants as such trustees all the railway of the said Bedford and Bloomfield Railroad Company from Switz City in Green County, to Bedford in Lawrence County, about 41 miles in length, all being in the State of Indiana, together with all the lands, rights of wây, tracks, lines, rails, bridges, ways, buildings, structures, fences, fixtures, franchises and privileges and rights of said Bedford and Bloomfield Railroad Company of every kind and nature whatsoever, it being expressly covenanted that said premises and property should inure by way of benefit and advantage to said trustees and by way of better and additional security for the payment of the bonds issued under said mortgage dated January 1st, 1886; and that thereby all the said property included in said last mentioned conveyance of December 12th, 1896, became and was and now is part and parcel of the property covered by said mortgage dated January 1st, 1886.

It was also further ordered, adjudged and decreed that there have been issued and are now outstanding and secured by said mortgage dated January 1st, 1886, 4,700 of the bonds mentioned and described therein for $1,000 each, aggregating $4,700,000 of
principal, together with coupons for interest thereunto apper-
243 taining, and that default was made in the payment of interest
due upon said mortgage on the 1st day of October, 1886.

It was also further ordered, adjudged and decreed that the mortgage set forth in the bill of complaint herein of the complainants the Central Trust Company of New York and John H. Stotsenburg, made by the defendant Louisville, New Albany and Chicago Railway Company to said complainants bearing date May 1st, 1890, is a valid and subsisting mortgage and constitutes a lien upon the mortgaged premises, property and franchises described in said mortgage as follows (the words "party of the first part" and "Railway Company," in said description, being used to designate the defendant Lousiville, New Albany and Chicago Railway Co.):

"All the present and in future to be acquired railway system and property of the said party of the first part, of every kind and nature, and however owned, held, leased or enjoyed, together with all the equipment, appurtenances and franchises now owned or at any time hereafter to be acquired by it, being more particularly described as follows: All the present line of railway ex-

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tending from New Albany, Indiana, to Michigan City, in the same State, and also from Indianapolis, Indiana, to a point on the State line between Indiana and Illinois, about twenty miles southeast of the City of Chicago, Illinois, and also its proprietary and owned line of railroad, called the Bedford and Bloomfield Railroad, extending from Bedford to Switz City, in Indiana, and also its other proprietary and owned line of railroad, called the Orleans, West Baden and French Lick Springs Railroad, extending from Orleans to French Lick, Indiana, and also all its lands, station buildings, tracks and terminal faciliites in the City of Louisville, Kentucky, and also all its rights, interest, proprietary and leasehold estate and terminal facilities in the franchises, property, tracks and station buildings of the Chicago and Western Indiana Railroad Company, and in the Belt Railway Company of Chicago, in the City of Chicago, or elsewhere in the State of Illinois; and also all its real estate, trackage, leasehold and contract rights and terminal properties, stations, sidings and franchises in the City of Indianapolis, Indiana, and also all its leasehold and contract rights, trackage and terminal facilities vested in the party of the first part by virtue of its certain written contracts with the Jeffersonville, Madison and Indianapolis Railroad Company, the Pennsylvania Company, and the Louisville Bridge Company, whereby the trains and traffic of the said party of the first part are moved and handled between the City of New Albany, Indiana, and the City of Louisville, Kentucky, the before-mentioned system of railroads owned by the said party of the first part and exclusive of tracks leased and operated by it, being about five hundred and twelve miles in length, and situate in the Counties of Floyd, Clark, Washington, Orange, Lawrence, Greene, Monroe, Owen, Putnam, Montgomery, Tippecanoe, White, Pulaski, Starke, La Porte, Marion, Hamilton, Boone, Clinton, Carroll, Jasper, Newton and Lake, in the State of Indiana, and Cook County, in the State of Illinois, and Jefferson County, in the State of Kentucky; and also all other railroads,
extensions and branch lines which the railway company,
244 party of the first part, may at any time hereafter create, own
or acquire, whether by construction, purchase, consolidation or otherwise, whether within the State of Indiana, or in any other State, including and conveying by these presents all the property of every sort or nature, real, personal and mixed, now owned by said railway company and all that it may in the future add, construct or acquire, for the purposes of and connected with or appertaining to the railroads or railways above mentioned and described, whether now owned or hereafter to be constructed or acquired,

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together with all the lands, tracks, lines, rails, bridges, ways, buildings, shops, tanks, piers, wharves, structures, erections, turntables, fences, walls, fixtures, franchises, privileges and rights of the railway company, and also all locomotives, engines, tenders, cars, carriages, tools, machinery, manufactured and unmanufactured materials, coal, wood and supplies of every kind belonging or appertaining to the railway company; also all the tolls, incomes, issues and profits, arising out of the said property and its operation, and all rights to receive and recover the same, also all estate, right, title and interest of the party of the first part in and to any and all real estate belonging to said party of the first part; also all leasehold lands, with the buildings thereon erected, it being the true intent and meaning of these presents that the said railway company, party of the first part, shall and doth convey to the said trustees all and all manner of franchises of every kind and description, however derived and wherever situate, all and all manner of real estate or interest therein, wherever such real estate may be situate, and all and all manner of personal property, of whatever nature or description the same may be, at the date of these presents owned or possessed by the said railway company, or which may, at any time hereafter, during the continuance of this trust, be acquired by the said railway company for purposes connected with or appertaining to the railroads or railways above mentioned or described, or intended to be hereby conveyed, whether now in existence or at any time hereafter to be constructed or acquired, whether within or without the State of Indiana; and also all choses in action of every kind and description, including bills receivable, book accounts, traffic balances, all books of record and all accounts of every kind and description, all papers, maps, inventories and documents in any wise referring or relating to the property or franchises hereby conveyed; and also all franchises and property and all personal rights or interest in any franchises or property of every kind and description, real, personal or mixed, and wherever the same may be situate, that may, at any time, before or after the date of this indenture, be acquired by or for the said railway company, for purposes connected with or appertaining to said railroads or railways, either now owned or hereafter to be acquired, all of which it is hereby covenanted shall inure, by way of accretion, to the benefit and advantage of said trustees and by way of further and better security for the bonds to be issued hereunder; it being intended and hereby expressly covenanted that the lien of this indenture shall embrace and bind all railroads, real and personal property, choses in action, contract rights and franchises which the said railway company now owns, or at any time hereafter may own, as fully and to the same extent as if all such property were now in existence and owned by the said railway company, and were specifically described herein and conveyed hereby." Decree.

That said mortgage also constitutes a lien upon said shares of stock deposited with and held by said Farmers' Loan and
245 Trust Company under and by virtue of said agreement dated May 18th, 1886, subject only to the lien of said Farmers' Loan and Trust Company and said John H. Barker, as trustees under said mortgage dated January 1st, 1886; and that the lien of said mortgage of May 1st, 1890, upon all of said property, is subsequent and subordinate only to the lien of said mortgage of January 1st, 1886, and to the liens of said prior mortgages hereinbefore mentioned upon the properties covered by said prior mortgages respectively.

It was also ordered, adjudged and decreed that there have been issued and are now outstanding and secured by said mortgage dated May 1st, 1890, 2,800 of the bonds mentioned and described therein for $1,000 each, aggregating $2,800,000 of principal, together with coupons for interest thereto annexed, and that default was made in the payment of interest due upon said mortgage on the 1st day of November, 1896.

It was also ordered, adjudged and decreed that the mortgage set forth in the bill of complaint herein of the complainants the Central Trust Company of New York and James Murdock, made by the defendant Louisville, New Albany and Chicago Railway Company to said complainants, and bearing date the 1st day of September, 1894, is a valid and subsisting mortgage and constitutes a lien upon the mortgaged premises, property and franchises described in said mortgage as follows (the words "party of the first part" and "railway company," in said description, being used to designate the defendant Louisville, New Albany and Chicago Railway Company):

"All the railway system and property of the said party of the first part, of every kind and nature, and however owned, held, leased or enjoyed, together with all the equipment, appurtenances and franchises thereunto appertaining, being more particularly described as follows: All the present line of railway extending from New Albany, Indiana, to Michigan City, in the same State, and also from Indianapolis, Indiana, to a point on the State line between Indiana and Illinois, about twenty miles southeast of the city of

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246 length, and situate in the Counties of Floyd, Clark, Washington, Orange, Lawrence, Greene, Monroe, Owen, Putnam, Montgomery, Tippecanoe, White, Pulaski, Starke, La Porte, Marion, Hamilton, Boone, Clinton, Carroll, Jasper, Newton and Lake, in the State of Indiana, and Cook County, in the State of Illinois, and Jefferson County, in the State of Kentucky; including and conveying by these presents all the property of every sort or nature, real, personal and mixed, now owned by said railway company for the purposes of and connected with or appertaining to the railroads or railways above mentioned and described, together with all the lands, tracks, lines, rails, bridges, ways, buildings, shops, tanks, piers, wharves, structures, erections, turntables, fences, walls, fixtures, franchises, privileges and rights of the railway company, and also all locomotives, engines, tenders, cars, carriages, tools, machinery, manufactured and unmanufactured materials, coal, wood and supplies of every kind belonging or appertaining to the railway company; also all the tolls, incomes, issues and profits, arising out of the said property and its operation, and all rights to receive and recover the same, also all estate, right, title and interest of the party of the first part in and to any and all real estate belonging to said party of the first part; also all leasehold lands, with the build-

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ings thereon erected, it being the true intent and meaning of these presents that the said railway company, party of the first part, shall and doth convey to the said trustees all and all manner of franchises of every kind and description, however derived and wherever situate, all and all manner of real estate or interest therein, wherever such real estate may be situate, and all and all manner of personal property, of whatever nature or description the same may be, at the date of these presents owned or possessed by the said railway company, whether within or without the State of Indiana; and also all choses in action of every kind and description, including bills receivable, book accounts, traffic balances, all books of record and all accounts of every kind and description, all papers, maps, inventories and documents in anywise referring or relating to the property or franchises hereby conveyed; and also all franchises and property and all personal rights or interest in any franchises or property of every kind and description, real, personal or mixed, and wherever the same may be situate, that may, at any time, before or after the date of this indenture, be acquired by or for the said railway company, for purposes connected with or appertaining to said railroads or railways, hereby conveyed, all of which it is hereby covenanted shall inure, by way of accretion, to the benefit and advantage of said trustees, and by way of further and better security for the bonds to be issued hereunder; it being intended and hereby expressly covenanted that the lien of this indenture shall embrace and bind all railroads, real and personal property, choses in action, contract rights and franchises which the said railway company now owns, as fully and to the same extent as if all such property were specifically described herein and conveyed hereby."

That said mortgage also constitutes a lien upon said shares of stock deposited with and held by said Farmers' Loan and Trust Company under and by virtue of said agreement dated May 18th, 1886, subject only to the lien of said Farmers' Loan and Trust Company and said John H. Barker as trustees under said mortgage dated January 1st, 1886, and to the lien of said Central Trust Company of New York and said John H. Stotsenburg as trustees under said mortgage dated May 1st, 1890; and that the lien of said mortgage dated September 1st, 1894, upon all of said 247 property above mentioned and described is subsequent and subordinate only to the lien of said mortgage dated January 1st, 1886, and to the lien of said mortgage dated May 1st, 1890, and to the liens of said prior mortgages above mentioned upon the properties covered by said prior mortgages respectively.

That said mortgage dated September 1st, 1894, also includes

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and embraces certain other property consisting of five certain parcels of railroad equipment, that is to say:

1. 300 box cars built by the Haskell & Barker Car Company, costing $140,010.

2. 250 flat cars built by the Haskell & Barker Car Company, costing $96,250.

3. 200 coal cars and 50 stock cars built by the Haskell & Barker Car Company, costing $102,750.

4. 300 box cars and 250 flat cars built by Oliver Adams, agent, costing $293,224.

5. 1,000 flat cars built by the Haskell & Barker Car Company, costing $370,000.

All of said equipment included in said five parcels being marked "Owned by Central Trust Company of New York, Trustee Louisville, New Albany and Chicago Railway Company Equipment Mortgage."

And that said mortgage dated September 1st, 1894, is a first lien upon said railroad equipment, and prior to any other lien thereon in favor of any party to this cause.

It was also further ordered, adjudged and decreed, that the premises and property covered by said mortgage, dated January 1st, 1886, and said mortgage dated May 1st, 1890, and said mortgage dated September 1st, 1894, are the same and identical, with the exception that said mortgage dated January 1st, 1886, covers property not covered by said other mortgages, and consisting of the right, title and interest of said Orleans, West Baden and French Lick Springs Railway Company, and of said Bedford and Bloomfield Railroad Company, conveyed and mortgaged by said companies to the complainants Farmers' Loan and Trust Company and John H. Barker, as trustees, by said conveyances dated December 12, 1896; and with the exception that said mortgage dated September 1st, 1894, covers and is a first lien on said five parcels of railroad equipment, and said other mortgages only cover and embrace the right, title and interest of the defendant Louisville, New Albany and Chicago Railway Company in and to said five parcels of railroad equipment, subject to the lien of said mortgage dated September 1st, 1894. Decree.

It was also ordered, adjudged and decreed that there have been issued and are now outstanding and secured by said mortgage dated September 1st, 1894, 709 of the bonds mentioned and described therein for $1,000 each, aggregating $709,000 of principal, together with coupons for interest thereunto appertaining, and that default was made in the payment of interest due upon said mortgage on December 1st, 1896.

It was also ordered, adjudged and decreed that the amount due upon the said bonds secured by said mortgage dated January 1st, 1886, which is in default and which is now due and payeble, is as follows:

Interest due October 1st, 1896	$141,000 00
Interest thereon to the date of this decree	2,638 06
Total	$143,638 06

248 That the amount to become due upon the said bonds secured by said mortgage dated January 1st, 1886, and which is unpaid, is $4,700,000 with interest at six per cent. per annum from October 1st, 1896.

That the amount due upon the said bonds secured by said mortgage dated May 1st, 1890, which is in default and which is now due and payable is as follows:

Interest due November 1st, 1896	$ 70,000 00
Interest thereon to the date of this decree	959 68
Total	$ 70,959 68

That the amount to become due upon the said bonds secured by said mortgage dated May 1st, 1890, and which is unpaid, is $2,800,000 with interest at five per cent. per annum from November 1st, 1896.

That the amount due upon the said bonds secured by said mortgage dated September 1st, 1894, which is in default, and which is now due and payable, is as follows:

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Interest due December 1st, 1896	$ 17,725 00
Interest thereon to the date of this decree	154 38
Total	$ 17,879 38

That the amount to become due upon the said bonds secured by said mortgage dated September 1st, 1894, and which is unpaid, is $709,000 with interest at five per cent. per annum from December 1st, 1896.

It was also ordered, adjudged and decreed that the defendant Louisville, New Albany and Chicago Railway Company shall within ten days after the entry of this decree pay or cause to be paid to the complainants The Farmers' Loan and Trust Company and John H. Barker, or to the Clerk of this Court, for the use and benefit of the holders of the outstanding bonds secured by said mortgage dated January 1st, 1886, and of the unpaid interest warrants or coupons appertaining thereto, the sum of $143,638.06 in gold coin of the United States of America, with interest thereon from the date of entry of this decree to the date of payment, being the sum adjudged to be due and payable by said defendant, and secured by said mortgage dated January 1st, 1886; and that within the same time the defendant Louisville, New Albany and Chicago Railway Company pay or cause to be paid to the complainants Central Trust Company of New York and John H. Stotsenburg, or to the Clerk of this Court, for the use and benefit of the holders of the outstanding bonds of said defendant secured by said mortgage dated May 1st, 1890, and of the unpaid interest warrants or coupons appertaining thereto, the sum of $70,959.68 in gold coin of the United States of America, with interest thereon from the date of the entry of this decree to the date of payment, being the sum adjudged to be due and payable by said defendant and secured by said mortgage dated May 1st, 1890; and that within the same time the defendant Louisville, New Albany and Chicago Railway Company pay, or cause to be paid, to the complainants Central Trust Company of New York and James Murdock, or to the Clerk of this Court, for the use and benefit of the holders of the outstanding bonds of said defendant secured by said mortgage dated September 1st,
249 1894, and of the unpaid interest warrants or coupons appertaining thereto, the sum of $17,879.38 in gold coin of the United States of America, with interest thereon from the date of the entry of this decree to the date of payment, being the sum adjudged to be due and payable by said defendant and secured by said mortgage dated September 1st, 1894.

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It was also ordered, adjudged and decreed that, unless the said payment, as hereinbefore directed with respect to said bonds secured by said mortgage dated January 1st, 1886, shall be made within the time directed as aforesaid, said mortgage be foreclosed and all property rights and interests conveyed thereby and upon which said mortgage is a lien, as the said property is hereinbefore particularly described be sold as hereinafter directed, and that under and by said sale all equity of redemption of the defendants,and of any and all persons claiming by, through or under the said defendants, or represented by any of the parties to this suit (except the interests of the Central Trust Company of New York and James Murdock, as trustees under said mortgage dated September 1, 1894, in and to said five parcels of railroad equipment hereinbefore mentioned and described) of, in and to said mortgaged premises, property, rights and franchises, and every part and parcel thereof embraced or included, or intended to be included, in the said mortgage, be foreclosed, and cut off and forever barred; that unless the said payment, as hereinbefore directed with respect to said bonds secured by said mortgage, dated May 1st, 1890, shall be made within the time directed as aforesaid, the said mortgage be foreclosed, and all property, rights or interests conveyed thereby, and upon which said mortgage is a lien, as the said property is hereinbefore particularly described, and including all material and supplies on hand at the time of the sale purchased or held by the receiver, be sold as is hereinafter directed. and that under and by said sale all equity of redemption of the defendants, and of any and all persons claiming by, through or under them, or represented by any of the parties to this suit (excepting the interest of The Farmers' Loan and Trust Company and John H. Barker. as trustees under said mortgage dated January 1st, 1886. and excepting the interests of the Central Trust Company of New York and James Murdock, as trustees under said mortgage dated September 1, 1894, in and to said five parcels of railroad equipment hereinbefore mentioned and described), of, in and to said mortgaged premises, property, rights and franchises, and every part and parcel thereof, embraced or included, or intended to be included, in the said mortgage, be foreclosed and cut off and forever barred; that, unless the said payment, as hereinbefore directed with respect to said bonds secured by said mortgage dated September 1st, 1894, shall be made within the time directed as aforesaid, the said mortgage be foreclosed, and all property, rights or interests conveyed thereby, and upon which said mortgage is a lien as the said property is hereinbefore particularly described, be sold as hereinafter directed, and that under and by said sale all cree.

equity of redemption of the defendants and of any and all persons claiming by, through or under them, or represented by any of the parties to this suit (excepting the interests of The Farmers' Loan and Trust Company and John H. Barker, as trustees under said mortgage, dated January 1st, 1886, and of the Central Trust Company of New York and John H. Stotsenburg, as trustees under said mortgage, dated May 1st, 1890, in and to that portion of the property covered by said mortgage dated September 1st, 1894, upon which said mortgages, dated respectively January 1st, 1886,
and May 1st, 1890, are prior liens as hereinbefore adjudged),
250 of, in and to said mortgaged premises, property, rights and
franchises and every part and parcel thereof embraced or included, or intended to be included, in the said mortgage, be foreclosed and cut off and forever barred. That the foreclosure above directed shall not nor shall either or any of them affect the prior liens of said mortgages hereinbefore mentioned made by said Louisville, New Albany and Chicago Railway Company, the one dated July 1st, 1880, and made to John C. New and Washington C. DePauw, as trustees, and the other dated August 10th, 1881, and made to John C. New as trustee.

It was also adjudged and decreed that the railway properties covered by said respective mortgages constitute one railroad system, and cannot be sold in separate parcels without injury to the rights of the creditors and of the parties in interest.

It was also ordered, adjudged and decreed that the property covered by said mortgage dated January 1st, 1886, and the property covered by said mortgage dated May 1, 1890, and the property covered by said mortgage dated September 1st, 1894, shall, subject to the provisions aforesaid, and in default of the payment of the sums hereinbefore found to be due and directed to be paid, be sold without valuation, appraisement or redemption at public auction to the highest bidder or bidders on the mortgaged premises at the Round House of the defendant Railway Company near the Belt Line junction in the City of Indianapolis, Indiana, on a day and at an hour to be fixed by the special master herein appointed, in his advertisement of sale, such day and hour to be fixed in accordance with the request of the solicitors for the complainants named in the bills filed herein for the foreclosure of said respective mortgages, and previous notice of the time, place and terms of said sale shall be given by publication of a brief general advertisement referring to this decree for further particulars and for a more specific description of the property herein ordered to be sold, which advertisement shall be published at least once in each week Decree. for the term of four weeks preceding the date of the sale in four newspapers of general circulation, one published in New Albany, Indiana; one in Indianapolis, Indiana; one in Chicago, Illinois, and one in the City of New York. The said special master may, at the request of the complainants named in the bills filed herein for the foreclosure of said several mortgages, or at the request of the solicitors for such complainants, adjourn or postpone said sale, and may without further notice proceed with said sale on any day to which the said sale may have been thus adjourned. The special master may give such further notice of sale in addition to the notice before described as he may think proper or as the said complainants may request. The complainants or any bondholder or bondholders may bid and purchase at said sale.

It was also ordered, adjudged and decreed that the said sale shall be conducted as follows, that is to say: Said special master shall first offer for sale, separately and in one parcel, the property which is covered by said mortgage dated January 1st, 1886, as hereinbefore found and decreed (upon which said property said mortgage dated May 1st, 1890, and said mortgage dated September 1st, 1894, are subsequent liens), the same being all of the property hereinbefore mentioned and described, excepting only said five parcels of railroad equipment, but including said shares of capital stock deposited with said Farmers' Loan and Trust Company and the said property conveyed to said Farmers' Loan and Trust Company by said Orleans, West Baden and
251 French Lick Springs Railway Company and said Bedford and
Bloomfield Railroad Company. Said Special Master shall next offer for sale, separately and in one parcel, the property which is covered by said mortgage dated September 1st, 1894, and upon which said mortgage is a first lien, the same being said five parcels of railroad equipment hereinbefore mentioned and described. In making such sale the said Special Master shall accept no bid for the property so to be first offered for sale (being all the property hereinbefore described, except said five parcels of railroad equipment) for a sum less than $2,500,000, nor from any bidder who shall not place in his hands or deposit with him, at the time of making the bid, as a pledge that such bidder will make good his bid, if accepted by the Court, the sum of $25,000 in money or certified check. In making such sale the said Special Master shall accept no bid for the said five parcels of railroad equipment from any bidder for a sum less than $500,000, nor from any bidder who shall not place in his hands or deposit with him at the time of mak-

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ing the bid as a pledge that such bidder will make good his bid if accepted by the court, the sum of $5,000 in money or certified check. After having offered said property separately as hereinbefore provided, said Special Master shall then offer for sale the entire property covered by said mortgage dated January 1st, 1886, and said mortgage dated May 1st, 1890, and said mortgage dated September 1st, 1894, including said five parcels or railroad equipment, as one parcel without valuation, appraisement or redemption, and if the highest bid received by him for the same shall exceed the aggregate amount of the highest bids for the two parcels when offered separately, then the whole shall be struck off and sold as an entirety to the person making such bid for the whole, and the proceeds of sale shall be divided into two parts in proportion to the amounts bid separately on said properties and distributed in the same manner as if said properties had been sold separately. Said Special Master shall accept no bid for the property as an entirety from any bidder for a sum less than $3,000,000, nor from any bidder who shall not place in his hands or deposit with him at the time of making the bid as a pledge that such bidder will make good his bid if accepted by the Court, the sum of $30,000 in money or certified check.

It was also ordered, adjudged and decreed that of the price for which said property shall be sold there shall be paid in cash at the time of sale the cash deposit or deposits hereinbefore required, which shall be received as a part of the purchase price, and also at the same time, and from time to time thereafter, such further portions of said purchase price shall be paid in cash as the Court may direct in order to meet the expenses of this suit and the suits consolidated herein, and such Receiver's indebtedness as shall have matured prior to the confirmation of sale herein, and to pay such claims, if any, against the mortgaged property as the court may adjudge to be prior in equity to the said mortgages. All sums of money received by said Special Master shall be paid by him into the registry of the Court. The Court reserves the right to reject any bid and to resell said premises and property upon the failure of any purchaser for twenty days to comply with any order of the Court requiring payment. The balance of the purchase price not required to be paid in cash may either be paid in cash or the purchaser may satisfy and make good said balance of his bid, in whole or in part, by paying over and surrendering outstanding bonds and overdue coupons appertaining thereto,
252 secured by said mortgage, dated January 1st, 1886, or outstanding bonds and overdue coupons appertaining thereto,

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secured by said mortgage, dated May 1st, 1890, or outstanding bonds and overdue coupons appertaining thereto, secured by said mortgage, dated September 1st, 1894, said bonds and coupons being received at such price or value as shall be equivalent to the amount that the holders thereof would be entitled to receive thereon in case the entire purchase price were paid in cash. All bonds and coupons that may be used to make such payment shall be surrendered to the Special Master and cancelled if the whole amount due thereon is applied upon the purchase price; but if less than the whole amount is applied, then the amount so applied shall be stamped or written upon said bonds and coupons which shall then be returned to the holder. The foregoing provisions shall be applicable whether the said properties be sold in separate parcels or as an entirety. As soon as any sale or sales shall have been made by the Special Master in pursuance of this decree he shall report the same to this court for confirmation, further certifying to the court compliance by the purchaser or purchasers with the conditions of sale as hereinbefore prescribed. If any bid shall be accepted by the court, and the person making the same shall fail to comply with all the conditions of sale and all orders of the court in respect thereto, the sum deposited by the bidder shall be forfeited and shall be applied as the court may direct.

It was also ordered, adjudged and decreed that the purchaser or purchasers of any parcel at such sale shall, as part of the consideration for such sale, and in addition to the price bid, take the property purchased upon the express condition that he or they, or his or their assigns approved by the court will notwithstanding pay off and satisfy any and all receiver's indebtness which shall not be paid by the receiver herein out of the income and earnings of the mortgaged property, or which shall not be paid out of the proceeds of sale as hereinafter directed; and also any and all claims heretofore filed, or which may hereafter be filed within a period to be limited by an order of this court, in this cause or either of the causes consolidated herein in respect of the parcel so purchased, but only when and as the court shall allow such claims and adjudge the same to be prior in lien to the mortgages foreclosed in this suit or either of them, and shall determine the parcel in respect of which such claims shall be payable, and in accordance with the order or orders of the court allowing such claims and adjudging with respect thereto; and the purchaser or purchasers or their approved assigns shall be entitled to appeal from any and all orders or decrees of the court in respect to such claims or any of them, and shall have all the rights in respect to such appeals which the complainants herein ecree. or any of them would have in case such appeals had been taken by them. The court reserves the right to retake and resell said property in case of the failure or neglect of the purchaser or purchasers or his or their assigns approved by the court as aforesaid, to comply with any order of the court in respect to the payment of receiver's indebtedness or prior lien claims within thirty days after the service of a certified copy of such order upon said purchaser or purchasers, or his or their assigns.

It was also ordered, adjudged and decreed that the fund or funds arising from the sale or sales of the properties above mentioned shall be applied as follows and in the following order, to-wit:

253 First: To the payment of the costs of this suit and of the suits consolidated herein and of the ancillary suits brought in the Circuit Court of the United States for the Northern District of Illinois by the same parties who are complainants herein, including all proper expenses of the sale herein ordered and such compensation as may be awarded by the court to said special master for making said sale, and the compensation of the complainants, The Farmers' Loan and Trust Company and John H. Barker, and the complainants Central Trust Company of New York and John H. Stotsenburg and James Murdock for their services, charges and expenses in the execution of their respective trusts, to be fixed and allowed by the court, and such proper allowances as the court may make for the fees and disbursements of the solicitors and counsel of said complainants, respectively, and next to the payment of such compensation as may be allowed to the receiver appointed in the suits consolidated herein and to the payment of any indebtedness of said receiver which has not been or shall not be paid out of the earnings and income of the property coming into the hands of said receiver, and which shall have matured and become payable at the time of the confirmation of sale herein. The above mentioned payments shall be apportioned between the funds received from such sale or sales and applicable respectively to the payment of said bonds secured by said several mortgages in such proportions as the court shall direct.

Second. The remainder of the fund derived from the sale of the property first to be offered for sale as hereinbefore directed, being all the property hereinbefore described, except said five parcels of railroad equipment, shall be applied (1st) to the payment ratably of the interest due and unpaid and of the principal unpaid upon said bonds secured by said mortgage, dated January 1st, 1886,

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without preference of interest over principal or principal over interest; (2d) to the payment ratably of the interest due and unpaid and of the principal unpaid upon said bonds secured by said mortgage, dated May 1st, 1890, without preference of interest over principal or principal over interest; and (3d) to the payment ratably of the interest due and unpaid and of the principal unpaid upon said bonds secured by said mortgage, dated September 1st, 1894, without preference of interest over principal or principal over interest.

Third. The remander of the fund derived from the sale of that portion of the property upon which said mortgage, dated September 1st, 1894, is a first lien as hereinbefore adjudged, the same being said five parcels of railroad equipment, shall be applied to the payment ratably of the interest due and unpaid, and of the principal unpaid upon said bonds secured by said mortgage, dated September 1st, 1894, without preference of interest over principal or principal over interest.

Should there be any surplus remaining after making the payments directed in this subdivision third, the same shall be added to the fund derived from the sale of the property other than said five parcels of railroad equipment, and shall be applied as directed in subdivision second above.

Fourth. Should there be any surplus after making the payments above directed, the same shall remain in the registry of the court to abide such order or decree as the court may make in respect thereto.

It was also ordered, adjudged and decreed, that William A. Van Buren, be, and he is hereby, appointed Special Master to execute this decree, and, upon confirmation of the sale or sales
254 hereby ordered and full compliance with the terms of sale by
the purchaser or purchasers, to make, execute and deliver to the purchaser or purchasers thereof a deed or deeds of the property sold; and, upon the request of the purchaser or purchasers, and exhibition of the Special Master's deed or deeds, the receiver, having possession of the property sold, shall make, execute and deliver to the said purchaser or purchasers good and sufficient deeds of conveyance or evidence of transfer of any and all property sold which is vested in, or standing in the name of said receiver, or to which said receiver has in any manner acquired title, and shall surrender to the purchaser or purchasers possession of the property

sold; and, upon confirmation of said sale or sales and full compliance with the terms of sale by the purchaser or purchasers, he or they shall be entitled to a deed or deeds of assurance to be executed according to law by the defendant Louisville, New Albany and Chicago Railway Company, and the complainants The Farmers' Loan and Trust Company and John H. Barker and the Central Trust Company of New York and John H. Stotsenburg and James Murdock.

The court reserves the right in term time or at Chambers to appoint another person Special Master with like powers in case of the death or disability to act of the Special Master hereby designated, or in case of his resignation or failure to act or removal by the court.

It was also ordered, adjudged and decreed that the purchaser or purchasers of the property herein decreed to be sold shall be invested with, and shall hold, possess and enjoy the said mortgaged premises and property herein decreed to be sold, or so much thereof as shall be purchased by him or them, and all the rights, privileges and franchises appertaining thereto as fully and completely as the said Louisville, New Albany and Chicago Railway Company now holds and enjoys, or has heretofore held or enjoyed the same; and further, that the said purchaser or purchasers shall have and be entitled to hold the said railroads and property freed and discharged of and from the liens of the mortgages foreclosed in this suit and from the claims of the parties to this suit, or any of them.

It was also ordered, adjudged and decreed that in case there should be any deficiency in payment of the amounts hereinbefore required and directed to be paid so that said amounts shall not be paid in full then said Special Master shall report to the court the amount of such deficiency, and the complainants as trustees of said mortgages respectively shall have judgment against the said defendant Louisville, New Albany and Chicago Railway Company for the amounts due, and shall have execution therefor pursuant to the rules and practice of this court.

It was also ordered, adjudged and decreed that all questions not hereby disposed of and determined be reserved for future adjudication, the settlement of the same being held not to be necessary for the purposes of this decree, and the court reserves the right to make such further orders at the foot of this decree as may seem just and proper. And the court reserves full power to adjudge with respect to the income of the receivership and the rights of creditors in and to the same.

255 And afterwards, to-wit: at the November Term of said Court, on the 27 day of February, 1897, before the Honorable John H. Baker, Judge of said Court, the following further proceedings in the above entitled cause were had, to-wit:

Intervening Petition of Louisville Trust Co.

Comes now the Louisville Trust Company by St. John Boyle, Esq., its solicitor, and by leave of Court files its intervening petition herein without prejudice to the right of complainant to move to strike the same from the files.

UNITED STATES CIRCUIT COURT, FOR THE DISTRICT OF INDIANA.

Farmers' Loan and Trust Company,
vs.
The Louisville, New Albany & Chicago Railway Co.
} Intervening Petition of the Louisville Trust Company.

255½ The petitioner, the Louisville Trust Company, respectfully represents that it is a corporation duly created and existing under and by virtue of the laws of the State of Kentucky, with full power to acquire, hold and dispose of real and personal property of all kinds; and that the defendant, the Louisville, New Albany & Chicago Railway Company, is a corporation that was duly created under and by virtue of the laws of the State of Indiana, and was also further duly created under and by virtue of the laws of the State of Kentucky, with authority to construct, maintain, and operate railways in and through the said States, and with further authority from the said States to acquire by lease, purchase, or otherwise, other railroads, and for such purpose to guarantee the payment of the principal and interest of the bonds or other obligations of any railway connecting therewith.

And your petitioner further represents that the Richmond, Nicholasville, Irvine & Beattyville Railroad Company, hereinafter called the Beattyville Company, was a corporation created and existing under and by virtue of the laws of the State of Kentucky, and duly authorized to construct, maintain and operate a rail-
256 way therein, and to make, execute, and sell its negotiable bonds, and to secure the payment thereof by mortgage or deed of trust upon all of its railways and franchises and other properties acquired and to be acquired.

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And the said Beattyville Company, being duly authorized, did make and execute an issue of 2,375 negotiable bonds (aggregating $2,375,000), dated July 1, 1889, by each of which it promised to pay to the Central Trust Company of New York, or bearer, the sum of one thousand dollars ($1,000) on the first day of July, A. D. 1919, with interest thereon from date at the rate of six per centum per annum, payable semi-annually and for which several installments of interest coupons were duly attached to said bonds; and the payment of the principal and interest of such bonds was secured by certain deed of trust in the nature of a mortgage, dated July 1, 1889, and executed by the said Beattyville Company to the said Central Trust Company of New York, and which bonds were subject to the provisions and conditions of the said mortgage. And the said Beattyville Railroad Company undertook and was, at the time hereinafter mentioned, engaged in the construction of a railroad in the State of Kentucky, beginning at Versailles in the County of Woodford in said State, and which is a point on the Louisville Southern Railway, and extending thence through Nicholsville, Richmond, and Irvine to Beattyville, in the said State, and part of which was then completed, and the same is now complete and in operation from Versailles aforesaid to Irvine aforesaid.

And your petitioner further represents that the said Louis-
257 ville, New Albany & Chicago Railway Company, hereinafter styled "The New Albany Company," being in possession, under lease, of the Louisville Southern Railway, running between Louisville and Lexington, in Kentucky, and through the said town of Versailles, and being then engaged in operating the same and desiring to acquire the said Beattyville road, which was then partly built and partly under construction, and to control and operate the same, entered into an agreement with the Ohio Valley Improvement and Contract Company—a corporation organized and existing under the laws of the State of Kentucky—whereby said New Albany Company undertook and agreed to guarantee certain bonds of the said Beattyville Company, of the issue aforesaid, as set out in the said agreement, in consideration of which it was to receive the controlling interest in the capital stock of the said Beattyville Company; and thereafter in pursuance of the said contract, the said New Albany Company did make and endorse upon certain of the said bonds its written guaranty, as follows:

"For value received, the Louisville, New Albany & Chicago Railway Company hereby guarantees to the holder of the within bond the payment by the obligor therein of the principal and interest thereof, in accordance with the tenor thereof.

Intervening Petition of Louisville Trust Co.

"In testimony whereof, the said railway company has caused its corporate name to be signed by its President and its seal to be attached by its Secretary.

And which guarantee, being duly executed as recited therein and endorsed upon the said bonds, and the consideration therefor having been received, the said bonds were duly delivered to the Ohio Valley Improvement and Contract Company, and were by said company disposed of in open market; and that
among the said bonds there were 125 thereof (Nos.. . to. .
258 inclusive) which were pledged to your petitioner, who re-
ceived the same in the regular course of business in good faith and for value, and now is the owner and holder thereof as such pledgee, and the debt for which the same were pledged remain wholly due and unpaid. And the petitioner says that afterwards on April 9, 1890, the said New Albany Company filed in the United States Circuit Court for the District of Kentucky, its bill of complaint against the said Ohio Valley Improvement and Contract Company and others, and afterwards on January 28, 1893, filed its supplemental bill, in which the petitioner was made the defendant, sought and prayed that the guaranty of the said company on the bonds held by the petitioner should be cancelled and held illegal and void, and to which the said defendant answered.

And such proceedings were had therein that the said Circuit Court so decreed; and this petitioner thereupon appealed to the United States Circuit Court of Appeals for the Sixth Circuit, and such proceedings were had therein that the said decree of the Circuit Court was reversed, and the said court, being of opinion that the said guaranty endorsed upon the bonds held by this petitioner were valid and binding against the complainant in the hands of the petitioner, ordered that the said bill of complaint be dismissed. (See Louisville Trust Company v. Louisville R'y Co., 75 Fed. R. 433.) And afterwards, on November 14, 1896, the opinion and the mandate of the said Circuit Court of Appeals was filed in the said Circuit Court, and thereupon it was ordered that the said bill
be dismissed, and that the petitioner among others should re-
259 cover its costs in said suit expended; and which judgment is in
full force and unreversed. And afterwards, on the 16th of November, 1896, the Supreme Court of the United States, by a writ of *certiorari*, ordered the Circuit Court of Appeals to certify

the record therein to the said Supreme Court for review and determination, and upon which proceedings the said matters are pending. And by reason of the premises, the said New Albany Company is estopped to deny or set up any defense to the validity or enforcement of the said guaranty, but is bound by the judgment aforesaid.

And the petitioner further says that afterwards John T. Mills, Jr., instituted a suit against the said New Albany Company in the United States Circuit Court for the District of Indiana, on August 24, 1896, and the said company appeared thereto and confessed judgment; and on the same day a writ of *fieri facias* was issued thereon, and on the same day was returned wholly unsatisfied; and thereupon, on the same day, the said John T. Mills, Jr., filed his bill of complaint herein and moved for the appointment of a receiver to take charge of all the assets and properties of the said defendant company, and to which the said company appeared and confessed the allegations of the bill of complaint; and thereupon W. H. McDoel was appointed receiver, who had theretofore been the general manager of the said company. And the petitioner charges that the said J. T. Mills, Jr., claimed to be a creditor to the amount of $494,911.35, but did not disclose or discover to the court, in his proceedings, that he was not a general creditor, but he was at the time, if a creditor at all, secured with collateral securities, the value whereof is unknown to
260 your petitioner. And the petitioner charges that the proceedings in behalf of the said John T. Mills, Jr., were procured by the said New Albany Company for the purpose of hindering and delaying the general or unsecured creditors of the said company in the enforcement of their debts; and that since the entry of the said order of appointment no step has taken in the said cause, either to ascertain or to bring into court the assets, which are subject to the payment of the said debts, and no proceeding has been taken to notify or to bring before the court the said general or unsecured creditors; that afterwards, on November 12, 1896, the Farmers' Loan and Trust Company filed its bill against the said New Albany Company to foreclose the mortgage executed to the complainant as trustee, dated January 1, 1886, to secure an issue of ten millions of dollars of bonds; and also on the same day the Central Trust Company filed its bill of complaint to foreclose a mortgage executed by the said New Albany Company to the said Central Trust Company and John H. Stotsenburg, trustees, on May 1, 1890. And on the same day, November 12, 1896, an order was entered herein consolidating the said causes and extending

Intervening Petition of Louisville Trust Co.

the receivership under such bills, and thereafter, on the....day of....1897, a decree was entered herein foreclosing the said mortgage and ordering a sale of the mortgaged properties, and all of which was done before there was a right to have such decree entered, and without bringing before the court the general or unsecured creditors so that they might be heard in their own behalf.

And the petitioner further says that prior to the entry of the 261 said decree the holders of the bonds secured by the mortgages to the Farmers' Loan and Trust Company and the Central Trust Company aforesaid, and the holders of the preferred and common stock of the said Louisville, New Albany & Chicago Railway Company, or a part thereof, had entered into an arrangement or agreement for the purpose of procuring the sale of the said property, its purchase by and in behalf of the parties entering into such combination, and re-organization thereof, and the issue of securities to the said parties, including said stockholders, without the payment of the debts and liabilities of the said company, and for the purpose of hindering and delaying the said creditors and with a view to prevent the collection or enforcement of such debts and liabilities; and that the said decree of sale was obtained by the said company and said complainants in order to carry out such unlawful purpose and to prevent the general or unsecured creditors of the said company from having an opportunity to be heard in matters arising in the said cause.

Your petitioner alleges that the defendant, the Louisville, New Albany & Chicago Railway Company, was originally formed and established under and in accordance with the laws of the State of Indiana, on the....day of....with the usual powers incident to railway corporations, and that afterwards the said company procured a law to be passed by the State of Kentucky, whereby the said corporation was made and declared to be a corporation of the State of Kentucky by an act of the General Assembly of such State, entitled "An Act to Incorporate the Louisville, New Albany & Chicago Railway Company, approved April 8, 1880," and amended by another act entitled "An Act to Amend an 262 Act to Incorporate the Louisville, New Albany & Chicago Railway Company, approved April 8, 1880," and by virtue of which the said corporation was a corporation of the States of Indiana and Kentucky.

The petitioner says that afterwards, on or about July 11, 1881, the said defendant undertook and attempted to consolidate

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and merge its capital stock, properties, and franchises with an alleged corporation known as the Chicago & Indianapolis Air Line Railway Company, by certain articles of consolidation, dated May 5, 1881, a copy of which articles is filed herewith as part hereof, marked "Exhibit A." The petitioner alleges that the pretended corporation known as the Chicago & Indianapolis Air Line Railway Company, claimed and pretended to be a consolidated corporation under the laws of the State of Illinois and Indiana, and that it had been formed and created by a consolidation of a corporation known as the Chicago & Dyer Company and the Chicago & Indianapolis Air Line Railway Company that the said Chicago & Dyer Railroad Company was a corporation created and established under the laws of the State of Illinois, with authority to build and construct railways, and with other powers incident thereto.

And the said Chicago & Indianapolis Air Line Railway Company was a corporation formed and created and in accordance with the laws of the State of Indiana, with power to construct and maintain railways, and other powers incident thereto; and that the said two corporations claimed and pretended and attempted, on or about January or February, 1880, to consolidate their capital stock,
franchises, and properties, by consolidating the said two com-
263 panies, and which said consolidated company claimed and pre-
tended to acquire railway properties and to construct and maintain a railway from Chicago in the State of Illinois to Indianapolis in the State of Indiana. Your petitioner alleges that at the time of this said pretended consolidation it was against the law and policy of the State of Illinois to allow or permit such consolidation, or the consolidation of any such railway company of that State with any railway company of another State, and and that the said attempted consolidation was void and of no effect, and passed no title or rights or franchises to such consolidated company, and it has been so decided and determined by the Supreme Court of the State of Illinois in the case of the American Loan & Trust Company v. the Minnesota Company, 42 N. E. Reporter, 153.

And the petitioner alleges that after such pretended and attempted consolidation the defendant, the Louisville, New Albany & Chicago Railway Company, attempted to consolidate with this consolidated company, called the Chicago & Indianapolis Air Line Railway Company, and that such attempted consolidation was unauthorized and void and of no effect, and that the agreement of consolidation was unlawful and void; and the said defendant ac-

quired no right, title or interest in and to the pretended properties, rights or franchises of said Chicago & Indianapolis Air Line Railway Company; and the issue of bonds and stock agreed to be made by the defendant company was contrary to law and after such pretended consolidation the defendant, the Louisville, New Albany & Chicago Railway Company, did issue to the alleged **Intervening Petition of Louisville Trust Co.**
264 holders of the capital stock of the Chicago & Indianapolis Air Line Railway Company a large amount of stock in the pretended consolidated company, and did make and execute a mortgage to the Farmers' Loan and Trust Company, of New York, and John H. Baker, trustees, dated January 1, 1886, embracing the properties and franchises claimed to be owned by the said Consolidated Air Line Railway Company, for the purpose of securing the payment of $2,300,000 of bonds, dated August 10, 1881, payable August 10, 1911, with interest at the rate of six per cent. per annum, and which said mortgage was wholly void, and which said bonds were illegal and unauthorized.

And the petitioner alleges that all of the said issue of bonds are now outstanding and unpaid. The mortgages thereafter executed by the said Louisville, New Albany & Chicago Railway Company to the Farmers' Loan and Trust Company, dated January 1, 1886, to secure ten millions of dollars, and the mortgage by the same company to the Central Trust Company of New York, dated May 1, 1890, both of which mortgages are set forth in the bills of complaint filed by the said companies herein, pretended to have been made and executed subject to the issue of the bonds before mentioned, and all of the said pretended mortgages were unlawful and void, and did not constitute any charge or lien upon the property embraced therein, and were not duly and properly executed, and especially did not and could not embrace any property or any portion thereof, or of the rights and franchises that were claimed or pretended to belong or be acquired from the Chi-
265 cago & Indianapolis Air Line Railway Company.

And the petitioner represents that the matters herein contained have not been disclosed or set up in this cause, and that no opportunity has been given the petitioner or other creditors of the defendant company to ascertain and prove the same and be heard in relation thereto, and that the decree of foreclosure and sale entered herein has been prematurely and inadvertently entered, and ought in justice and equity to be set aside.

And the petitioner further represents that there are large and valuable assets belonging to said New Albany Company which are not included in any of the alleged mortgages, and which assets are subject to the debts and liabilities of the unsecured creditors of the said company, but the nature, description and amount of such assets are unknown to your petitioner. And among others, your petitioner says that the said receiver entered upon and took possession of the railroad of the said New Albany Company on August 24, 1896, and has continued since to maintain and operate the same, and receive the tolls, income and profits thereof, and to pay the expenses of such operation; and that all the moneys earned by the said receiver over and above the amount necessary to pay the operating expenses should be, and does, constitute a fund for distribution among the creditors of the said defendant company; and that the said net earnings amount to a large sum, but the amount thereof is unknown to your petitioner.

And the plaintiff says that the said mortgage to the Central
266 Trust Company, etc., of May 1, 1890, provides as follows:

> "Until default shall be made in the payment of the principal or interest secured by said bonds or some of them, and such default shall have continued for a period of six months as hereinafter set forth, the Railway Company shall be permitted to possess, manage, operate and enjoy all and singular the mortgaged premises with their appurtenances,and to take, demand, use and enjoy the rents, income, profits and issues of all and singular the premises and property hereby conveyed in the same manner and to the same effect as if this indenture had not been made."

And the petitioner says that no default occurred in the payment of the principal or interest of the said bonds or any of them until November 1, 1896, and which default has not yet continued for the space of six months; and the said mortgagee is not entitled to the benefit of any of the earnings of the said receiver, accrued from the operation of the railway in his charge; and that under and by virtue of the provisions of the mortgage aforesaid, there was no right to a foreclosure of the said mortgage because of such default in the payment of interest until after said period of six months, and the said decree of foreclosure upon the said mortgage was premature.

And your petitioner further represents that in the aforesaid mortgage to the Farmers' Loan and Trust Company, dated Janu-

Intervening Petition of Louisville Trust Co.

ary 1, 1886, it was provided that until default should be made in the payment of the said bonds or some of them, the said Railway Company should be permitted to possess, manage, operate and enjoy all and singular the mortgaged premises. And it was further provided therein that the trustees should have the right to enter and sell, "in case default in the payment of interest on any of the bonds secured by this deed shall be made, and continue for 267 the space of six months, and such payment shall be duly demanded." And it was further provided that it was only in the same event that there should be a right to foreclose the said mortgage; and no such default did occur until October 1, 1896, and that the said mortgagee and the holders of bonds secured thereby are not entitled to the benefit of any of the earnings accrued or accruing in the operation of the said railway by the receiver herein, and is not entitled to foreclose the said mortgage until after the expiration of the period of six months aforesaid.

And your petitioner further says that it is informed and believes that a large portion of the capital stock of the said New Albany Company has been issued and has not been fully paid by the subscribers or holders thereof; and that a very large sum of money is due and payable by the holders of the said stock to the said company, and which constitutes a trust fund for the payment of the debts of the said corporation, and which should be directed herein to be collected for and in behalf of such creditors, and be distributed accordingly.

Wherefore, your petitioner prays that the decree of foreclosure and sale heretofore entered in this cause be set aside, that the pretended consolidations herein mentioned be adjudged void, and that the said mortgages before mentioned be declared to be invalid; that this cause be referred to a commissioner to ascertain and report what assets of the said New Albany Company are embraced by any liens, and what are not so included, and the amounts and descriptions thereof; and that, among other things, the 268 master be directed to ascertain what portion of the capital stock has not been paid for, and the amounts due thereon; and that the receiver herein be directed to take steps to enforce the collection of any amounts due to the said company; that due and proper advertisement be given for the proof of debts, and that said master be directed to ascertain and report the names of the creditors herein and the amounts of debts due to them; that it be adjudged that the said master ascertain what net earnings have accrued, and shall hereafter accrue, from the operation of the said

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railway in the hands of the receiver, and that the amount thereof be adjudged and declared to be a fund to be distributed among the general and unsecured creditors of the said company; and that all such other and further proceedings be had for the sale of the assets of the said company and the distribution thereof, according to law and the rights of the parties.

Wherefore, the petitioner prays that an order be entered herein, commanding the plaintiff, John T. Mills, Jr., the Farmers' Loan and Trust Company of New York, The Central Trust Company of New York, and the Louisville, New Albany & Chicago Railway Company to appear within a time to be fixed in such order, and to plead or make answer to the allegations herein; and for all such other and further orders and judgments as to the court shall seem meet and proper.

H. V. Loving,
Pres.
St. John Boyle,
Solicitor for Louisville Trust Co.

State of Kentucky, }
Jefferson County. }

Personally appeared before me, E. J. Hayward, a notary
269 public in and for said State & county; H. V. Loving, who being duly sworn sayeth that he is President of the Louisville Trust Company and that the statements contained in the foregoing petition are true as he verily believes.

E. J. Hayward,
[seal] Notary Public, Jefferson Co., Ky.

And afterwards, to-wit: at the November term of said court, on the 9 day of March, 1897, before the Honorable William A. Woods, Judge of said court, the following further proceedings in the above entitled cause were had, to-wit:

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same.

The petition of the Louisville Trust Company filed herein on the 27 day of February, 1897, came on to be heard this day and was argued by counsel and upon consideration thereof the court refuses to vacate the decree of foreclosure and sale heretofore entered in this cause on the 23 day of January, 1897, and refuses to enter and order postponing or adjourning the sale.

270 And afterwards, to-wit: at the November term of said court on the 10th day of March, 1897, before the Honorable William A. Woods, Judge of said court, the following further proceedings in the above entitled cause were had, to-wit:

Comes now William A. VanBuren, Esq., Special Master herein and files his report of sale herein in the words and figures following, to-wit:

Special M ter's repo of sale.

I, William A. VanBuren, heretofore appointed Special Master under certain final decrees of foreclosure and sale entered by the Circuit Court of the United States for the District of Indiana and the Circuit Court of the United States for the Northern District of Illinois, in the suits therein pending under the above title, respectfully report to the court:

Pursuant to the directions of said decrees, I caused notice to published at least once in each week for the term of four weeks preceeding the date of sale, in four newspapers of general circulation, to-wit:

The New Albany Tribune published in New Albany, Indiana; The Indianapolis Journal published in Indianapolis, Indiana; The Chicago Tribune published in Chicago, Illinois; and The Commercial Advertiser, published in the City of New York, in which it was stated that I would on the 10th day of March, 1897, or the day day to which I might adjourn the sale, at eleven o'clock in the forenoon, at the round house of the defendant Louisville, New Albany and Chicago Railway Company, near the Belt Line Junction in the City of Indianapolis, Indiana, sell at public auction to the highest bidder or bidders, the property directed by the said decrees to be
sold, which notice also contained the terms of sale and a de-
271 scription of the property to be sold, and a reference to said de-
crees. A copy of said notice, marked "Schedule A." is hereunto annexed, forming a part of this report.

On the 10th day of March, 1897, at eleven o'clock in the forenoon, I attended at the round house of the defendant Louisville, New Albany and Chicago Railway Company, near the Belt Line Junction in the City of Indianapolis, Indiana, and then and there, as required by said decrees, offered for sale at public auction, to the

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highest bidder or bidders, the railroads and property which by said decree I was directed to sell, the same being described in said notice of sale, in the following manner, that is to say:

1. I first offered for sale, separately and in one parcel, all the property mentioned and described in said notice of sale, excepting only five parcels of railroad equipment. The highest and best bid for said property was made by Frederic P. Olcott, Henry W. Poor and Henry C. Ruse as a committee of the bondholders of the Louisville, New Albany and Chicago Railway Company who bid for the same the sum of two million five hundred thousand dollars, ($2,500,000.00), and at the time of making such bid, placed in my hands or deposited with me a pledge that they would make good their bid if accepted by the court, the sum of twenty-five thousand dollars in a certified check.

2. I next offered for sale separately and in one parcel, said five parcels of railroad equipment mentioned and described in said notice of sale. The highest and best bid for said property
272 was made by Frederic P. Olcott, Henry W. Poor, and Henry C. Russe as a committee of bondholders of the Louisville, New Albany and Chicago Railway Company who bid for the same the the sum of five hundred thousand dollars ($500,000.00), and at the time of making such bid placed in my hands or deposited with me as a pledge that they would make good their bid if accepted by the court the sum of five thousand dollars in a certified check.

3. After having offered said property separately as above mentioned, I then offered for sale the entire property mentioned and described in said notice of sale, and including said five parcels of railroad equipment, as one parcel. The highest and best bid for said property was made by Frederic P. Olcott, Henry W. Poor and Henry C. Rouse as a committee of the Louisville, New Albany and Chicago Railway Company who bid for the same the sum of three million and one thousand dollars ($3,001,000.00), and at the time of making such bid placed in my hands or deposited with me as a pledge that they would make good their bid if accepted by the court, the sum of thirty thousand dollars in certified checks.

The highest bid received by me for said entire property exceeded the aggregate amount of the highest bids for the two parcels so offered separately as offered. I thereupon struck off and sold to said Frederic P. Olcott, Henry W. Poor and Henry C. Rouse said railroads and property as an entirety, for their said bid of three

Special Master's of Sale.

million and one thousand dollars ($3,001,000.00), and I have paid into the registry of this court the sum of $30,000 cash paid
273 over by said purchasers on their said last mentioned bid.

All of which is respectfully submitted.

Dated March 10, 1897.

WILLIAM A. VAN BUREN,
Special Master.

TURNER, McCLURE & ROLSTON,
Solicitors for Complainants, The
Farmers' Loan and Trust Company aad
John H. Barker.
BUTLER, NOTMAN, JOLINE & MYNDERSE, AND
FLOYD A. WOODS,
Solicitors for Complainants,
Central Trust Company of New York,
John H. Stotsenburg and James Murdock.

And at the same time, on said 10th day of March, 1897, before the Honorable William A. Woods, Judge of said court, the following further proceedings in the above entitled cause were had, to-wit:

Order con ing sale.

Now, on this 10th day of March, 1897, comes the complainants The Farmers' Loan and Trust Company and John H. Barker, by Turner, McClure & Rolston, their solicitors, and the complainants Central Trust Company of New York, John H. Stotsenburg and James Murdock, by Butler, Notman, Joline & Mynderse and Floyd A. Woods, their solicitors, and move to confirm the sale made herein on the 10th day of March, 1897, by the Special Master, and to approve said Special Master's report of sale, which is dated March 10, 1897, and filed herein; and come also the defendants The Louisville, New Albany and Chicago Railway Company, The Orleans, West Baden and French Lick Springs Railway Company, and The Bedford and Bloomfield Railroad Company, by George W. Kretzinger their counsel, and complainant John T. Mills,
274 Jr., by Henry Crawford, his counsel, and consent to such confirmation; and it appearing by the report of said special master that Frederic P. Olcott, Henry W. Poor and Henry C. Rouse, as a committee of bondholders of the Louisville, New Albany and Chicago Railway Company the purchasers at said sale, bid for the

rder confirm-
g sale.

whole property sold the sum of $3,001,000.00, and that this was the highest and best bid, and said purchasers have made the payment thus far obligatory upon them, to-wit, the sum of $30,000, as provided in a decree of foreclosure and sale under which said sale was made, and no cause being shown against said redort, it is now

Ordered, adjudged and decreed that the report of sale of said Special Master be and the same is hereby confirmed, and that the said sale be and the same is hereby ratified, approved and confirmed, and made absolute, subject to the terms, provisions and conditions contained in the decree of foreclosure and sale herein dated January 23, 1897, and that said Special Master execute and deliver to said purchasers, or their assigns, a deed of conveyance of the property purchased by said purchasers at said sale.

It is further ordered, adjudged and decreed that the said purchasers or their assigns shall, within thirty days from the entry of this decree, pay to said Special Master the balance of said bid remaining unpaid, to-wit, $2,971,000, in the manner provided in said decree of foreclosure and sale, and upon such payment shall be entitled to take possession of the property purchased and every part thereof.

275 It is further ordered, adjudged and decreed that there be allowed and paid out of the proceeds of sale herein the proper taxable costs accrued in this case in this court, and also in the Circuit Court of the United States for the Northern District of Illinois in the suit pending in said last mentioned court between the same parties who are parties to this suit, but not including in such taxable costs any sums which already have been paid to said Clerks for or on account of costs herein. Said taxable costs so remaining unpaid shall be paid into said courts respectively in satisfaction of the cost bills still unpaid therein upon the certificates of the Clerks of said Courts respectively, showing the taxation of said costs, and the amount of said costs remaining unpaid.

It is further ordered, adjudged and decreed that there be paid to William A. VanBuren, the Special Master appointed to make the sale herein, the sum of $3,500,00 in full payment of his compensation and all his expenses heretofore incurred by him in performing his duties as Special Master, but not including the expenses of advertising the sale herein, amounting to the sum of $................ which sum is allowed to him and is to be paid out of the proceeds of sale for the purpose of paying expenses of advertising the sale herein. Of said sum of $3,500 the sum of

$2,000 shall be paid to him when he shall have completed his duties as Special Master herein, and shall have fiiled his final report of his proceedings as Special Master.

Order co
ing sale.

276 And afterwards, to-wit: at the November Term of said court on the 1st day of May, 1897, before the Honorable William A. Woods, judge of said court, the following further proceedings in the above entitled cause were had, to-wit:

Petition f
A

Comes now the Louisville Trust Company, by St. John Boyle, Esq., its solicitor, and files its petition for appeal to the United States Circuit Court of Appeals for the Seventh Circuit, together with its assignment of errors herein, in the words following, to-wi:

The Louisville Trust Company, intervenor herein, represents that the court has erred in the proceedings and in the orders and decrees in the above entitled cause, and which errors have been designated and set forth in an Assignment of Errors, which is filed herewith as part hereof.

Wherefore, said Louisville Trust Company prays an appeal to the Circuit Court of Appeals, and that a proper citation be granted requiring the Louisville, New Albany & Chicago Railway Company, John T. Mills, Jr., the Farmers' Loan and Trust Company and John H. Barker, trustees, The Central Trust Company of New York and John H. Stotsenburg, trustees, and James Murdock, trustee, and Fred P. Olcott, Henry W. Poor & Henry C. Rouse to appear and show cause to the said Circuit Court of Appeals why the decrees and orders in the said cause should not be reversed.

St. John Boyle,
For Louisville Trust Company.

UNITED STATES CIRCUIT COURT FOR THE
DISTRICT OF INDIANA.

Farmers' Loan and Trust Company,
Complainants,
vs.
Louisville, New Albany & Chicago
Railway Company,
Defendants.

277 Assignment of Errors by the Louisville Trust Company.

signment of
rors.

The Louisville Trust Company complains of errors in the proceedings in the United States Circuit Court for the District of Indiana, in the suit of the Farmers' Loan and Trust Company, &c., vs. the Louisville, New Albany & Chicago Railway Company, &c., and assigns the following errors:

First. The court erred in entering the decree of foreclosure and sale herein, because the said cause had not been prepared and was not ready for hearing, and the said hearing and decree was entered prematurely.

Second. The court erred in deciding that the trustees in the mortgages on which said decree was entered, were entitled to institute their several proceedings on such mortgages at the time when instituted, and in deciding that, according to the terms of the said mortgages, they or any of them were entitled to a decree of foreclosure and sale at the time of the entry of such decree.

Third. The court erred in adjudging that any such default had occurred or had been continued, so as to authorize the institution of proceedings for foreclosure or the entry of a decree of sale.

Fourth. The court erred in not requiring the receiver in the said cause to pay the interest due upon the said bonds secured by said mortgages, and in ordering the expenditures of moneys by the said receiver, which would have been sufficient and could have
278 been used in the payment of such interests.

Fifth. The court erred in refusing to set aside the order of

Assign
Errors.

sale upon the application of the said Louisville Trust Company for such an order on its intervening petition filed in the said cause, and in not postponing the said sale.

Sixth. The court erred in deciding that the mortgage to the said Farmers' Loan and Trust Company and John H. Barker, and the bonds secured thereby, was a good and valid mortgage upon the properties so decreed to be sold.

Seventh. The court erred in deciding that the mortgage executed to the Central Trust Company of New York and John H. Stotsenberg, and the bonds secured thereby, were good and valid obligations, or created a good and valid lien upon the properties embraced in the said decree of sale.

Eighth. The court erred in deciding that the said mortgages were good and valid mortgages upon the leasehold and other properties situated and existing within the State of Illinois, and in decreeing as sale of such properties thereunder.

Ninth. The court erred in directing a sale of the said railroad properties without ascerting what assets existed belonging to the company, and what net earnings had accrued under the receivership, and without applying or directing the application thereof to the payment of the interest on the mortgage bonds.

Tenth. The court erred in confirming the sale herein, and in not giving time in which parties might file exceptions to the same.

St. John Boyle,
of Louisville Trust Co.

279 And said petition for appeal is now by the court allowed, upon the filing by the said Louisville Trust Company of a proper bond in the penalty of $500, with sureties to the approval of the clerk of this court.

And afterwards, to-wit: at the May term of said court, on the 11th day of May, 1897, before the Honorable John H. Baker, one of the judges as aforesaid of said court, the following further proceedings in the above entitled cause were had, to-wit:

ond. **Comes** now the Louisville Trust Company by St. John Boyle, Esq., its solicitor, and files its bond on appeal herein, with the American Surety Company of New York as surety thereon, which bond is now approved by the clerk of this court and is in the words following, to-wit:

Know all men by these presents. That we the Louisville Trust Company and American Surety Company of New York are held and firmly bound unto the above named Louisville, New Albany & Chicago Railway Company, The Farmers Loan & Trust Co., The Central Trust, John H. Barker, John H. Stotsenburg, John T. Mills, Jr., F. P. Olcott, Henry W. Parr and Henry C. Rouse, in the sum of five hundred dollars to be paid to said parties to which payment well and truly to be made, we bind ourselves jointly and severally, and our and each of our heirs, executors and administrators, jointly by these presents.

Sealed with our seals and dated this 8th day of May, 1897.

Whereas the above named The Louisville Trust Company hath prosecuted an appeal to the United States Circuit Court of Appeals for the Seventh Circuit, to reverse the decree rendered in the above entitled suit by the Circuit Court of the United States for the District of Indiana; Now, therefore, the condition of this obligation is, that if the above named the Louisville Trust Co. shall prosecute his said appeal to effect and answer all costs and damages that may be adjudged or awarded against him, if he shall fail
280 to make good his plea, then this obligation to be void: otherwise in full force.

The Louisville Trust Co. (Seal.)
By H. V. Loving, President.
American Surety Company of New York, (Seal.)
By Ottwell Coy,
Resident Vice-President.
Frank D. Swope,
Resident Assistant Secretary.

Sealed and delivered in presence of
St. John Boyle.

Registered for American Surety
Company of N. Y., By Columbia
Finance & Trust Co., Louisville, Ky.
By Matt Owens.

Taken and approved by me this 11th day of May, 1897.
Noble C. Butler,
Clerk.

CHANCERY.

UNITED STATES OF AMERICA.

To The Louisville, New Albany & Chicago Railway Company, John T. Mills, Jr., The Farmers' Loan and Trust Company and John H. Barker, Trustees, The Central Trust Company of New York, and John H. Stotsenburg and James Murdock, trustees, Fred P. Olcott, Henry W. Poor and Henry C. Rouse, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Seventh Circuit, to be holden at Chicago thirty days after the date hereof, pursuant to an appeal which has been allowed by the Circuit Court of the United States for the District of Indiana, from its final decree in a suit wherein The Louisville Trust Company is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant as in the said appeal, should not be corrected, and why speedy justice should not be done to the parties in that behalf. Citation.

Witness the Hon. John H. Baker, Judge of the District Court of the United States for the District of Indiana, and ex-officio Judge of said Circuit Court, this 11th day of May, in the year of our Lord one thousand eight hundred and ninety-seven.

JOHN H. BAKER,
Judge.

[SEAL]

I served this citation by reading to Floyd A. Woods, attorney for The Central Trust Company of New York, and John H. Stotsenburg and James Murdock, to Indianapolis, May 14th, 1897, and delivering him a true copy of the citation on May 15, 1897. The attorneys for The Louisville, New Albany & Chicago Ry. Co., John T. Mills, Jr., The Farmers' Loan and Trust Company, John H. Barker, Fred P. Olcott, Henry W. Poor and Henry C. Rouse not found in my district.

S. E. KERCHEVAL,
U. S. Marshal.
By JOHN E. FOLEY,
Deputy.

Service	2.00
Copy	10
	2.10

UNITED STATES OF AMERICA, } ss.
DISTRICT OF INDIANA. }

ificate of
k

281 I, Noble C. Butler, Clerk of the Circuit Court of the United States within and for said district, do hereby certify that the above and foregoing is a full, true and complete transcript of the record in the cause of The Farmers' Loan and Trust Company, et al., against the Louisville, New Albany & Chicago Railway Company, et al., on the Intervening Petition of the Louisville Trust Company, as fully as the same appears upon the records and files now in my office.

Witness my hand and the seal of said court, at Indianapolis in said district, this 11th day of May, A. D. 1897.

NOBLE C. BUTLER,
Clerk.

[SEAL]

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held at the United States Court Rooms, in the City of Chicago, in said Seventh Circuit, on the fifth day of October, 1896, of the October term, in the year of our Lord one thousand eight hundred and ninety-six and of our Independence the one hundred and twenty-first year.

And afterwards, to wit, on the twenty-fifth day of May, 1897, in the October term last aforesaid, came the Farmers' Loan and Trust Company, by its counsel, Mr. Herbert B. Turner, and filed in the Clerk's office of the said Court his appearance, which said appearance was in the words and figures following, to wit :

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE SEVENTH CIRCUIT.

The Louisville Trust Company — October Term, 1896.

No. 420. *versus*

The Louisville, New Albany & Chicago Railway Co. *et al.*

The Clerk will enter my appearance as counsel for the Farmers' Loan and Trust Company. Herbert B. Turner.

Note : Must be signed by a member of the Bar of the United States Circuit Court of Appeals for the Seventh Circuit. Individual and not firm names must be signed.

Endorsed : Filed May 25, 1897. Oliver T. Morton, *Clerk.*

And afterwards, to wit, on the sixteenth day of September, 1897, in the October term last aforesaid, came John T. Mills, jr., by his counsel, Mr. Henry Crawford, and filed in the Clerk's office of the said Court, his appearance, which said appearance was in the words and figures following, to wit :

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE SEVENTH CIRCUIT.

October Term, 1896.

The Louisville Trust Company, - - - - *Appellant*,

No. 420. *versus*

The Louisville, New Albany & Chicago Railway Co. *et al.*, *Appellees.*

The Clerk will enter my appearance as counsel for John T. Mills, jr., Appellee.

Henry Crawford,
Solicitor for John T. Mills, jr.

Note: Must be signed by a member of the Bar of the United States Circuit Court of Appeals for the Seventh Circuit. Individual and not firm names must be signed.

Endorsed: Filed Sept. 16, 1897. Oliver T. Morton, *Clerk.*

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held at the United States Court Rooms, in the City of Chicago, in said Seventh Circuit, on the fourth day of October, 1897, of the October Term, in the year of our Lord one thousand eight hundred and ninety-seven and of our Independence the one hundred and twenty-second year.

And afterwards, to wit, on the fourth day of October, 1897, in the October term last aforesaid, in the record of proceedings thereof, in said entitled cause, appears the following entry, to wit:

Monday, October 4, 1897.

Before: Hon. William A. Woods, Circuit Judge.
Hon. James G. Jenkins, Circuit Judge.
Hon. John W. Showalter, Circuit Judge.

The Louisville Trust Company, - - - - *Appellant*,

No. 420. *versus*

The Louisville, New Albany & Chicago R. R. Co. *et al.*

It is now here ordered that this cause be, and the same is hereby, set down for hearing, Thursday, November 4, 1897.

And afterwards, to wit, on the sixth day of October, 1897, in the October term last aforesaid, came the appellees, by their counsel, Mr. A. H. Joline, Mr. Elisha C. Field, Mr. G. W. Kretzinger, and Mr. Floyd A. Woods, and filed, in the Clerk's office of said Court, their appearance, which said appearance was in the words and figures following, to wit:

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE SEVENTH CIRCUIT.

October Term, 1896.

The Louisville Trust Company, - - - - - *Appellant*,

No. 420. *versus*

The Louisville, New Albany & Chicago Railroad Co. *et al.*

The Clerk will enter my appearance as counsel for the appellees.

A. H. Joline,
Elisha C. Field,
G. W. Kretzinger,
Floyd A. Woods.

Note: Must be signed by a member of the Bar of the United States Circuit Court of Appeals for the Seventh Circuit. Individual and not firm names must be signed.

Endorsed: Filed October 6, 1897. Oliver T. Morton, *Clerk.*

And afterwards, to wit, on the twelfth day of October, 1897, in the October term last aforesaid, came the appellees, by their counsel, Mr. G. W. Kretzinger, Mr. E. C. Field, Mr. A. H. Joline, and Mr. Floyd A. Woods, and filed in the Clerk's office office of said Court, its motion to dismiss appeal, which said motion was in the words and figures following, to wit:

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE SEVENTH CIRCUIT.

October Term, A. D. 1896.

No. 420.

MOTION TO DISMISS APPEAL.

And now comes the Louisville, New Albany & Chicago Railway Co., by G. W. Kretzinger and E. C. Field, its solicitors, and the

Farmers Loan and Trust Company and John H. Barker, the Central Trust Company of New York, John H. Stotsenberg and James Murdock, as Trustees, by Floyd A. Woods, their solicitor, and Frederick P. Olcott, Henry W. Poor, and Henry C. Rouse, by Adrian H. Joline, their solicitor, and show to the Court:

1. August 24, 1896, John T. Mills, jr., one of the appellees, filed his certain creditor's bill in the Circuit Court of the United States for the district of Indiana, against the Louisville, New Albany & Chicago Railway Company, and moved thereon for the appointment of a receiver, which motion was granted and receiver appointed and possession taken. (Printed Transcript, 42.)

2. Thereafter, and on November 12th, 1896, The Farmers Loan and Trust Company of New York, with their associate trustees, filed their separate bills in said Court to foreclose the several mortgages in the bills mentioned. (Printed Transcript, 88.)

That thereafter these cases and the case of Mills on creditor's bill were, by the order of said Court, consolidated, with the direction that thereafter said cause should proceed as consolidated cause, entitled, "The Farmers Loan and Trust Company and John H. Barker, complainants, against," etc. (Printed Transcript, 97.)

3. That, January 23, 1897, appellant appeared in the Circuit Court and filed its petition therein alleging, among other things, that it was the owner of 125 of the bonds of the Richmond, Nicholasville, Irvine & Beattyville Railroad Company, on which was endorsed the guaranty of the Louisville, New Albany & Chicago Railway Company; that no part of the interest had been paid thereon since January 1, 1891, and thereon appellant moved that it be allowed to file this petition, etc., which was granted. (Printed Transcript, 166.)

4. On the same date, to wit: January 23, 1897, the Circuit Court entered a decree foreclosing the mortgages described in the above mentioned bills, with an order directing the sale thereunder by special master, subject to the following liabilities and terms. (Printed Transcript, 185):

> "It was also ordered, adjudged and decreed that the purchaser or purchasers of any parcel at such sale, shall as part of the consideration of such sale, and in addition to the price bid, take the property purchased upon the express condition that he or they or his or their assigns approved by the court will, notwithstanding, pay off and satisfy any and all receiver's indebtedness which shall not be paid by the receiver herein out of the income and earnings of the mortgaged property, or which shall not be paid out of the proceeds of sale hereinafter directed; and also any and all claims heretofore filed, or which

may be hereafter filed within a period to be limited by an order of this court, in this cause or either of the causes consolidated herein in respect of the parcel so purchased, but only when and as the court shall allow such claims and adjudge the same to be prior in lien to the mortgages foreclosed in this suit or either of them, and shall determine the parcel in respect of which such claims shall be payable, and in accordance with the order or orders of the court allowing such claims and adjudging with respect thereto; and the purchaser or purchasers or their approved assigns shall be entitled to appeal from any and all orders or decrees of the court in respect to such claims or any of them, and shall have all the rights in respect to such appeals which the complainants herein or any of them would have in case such appeals had been taken by them. *The court reserves the right to retake and resell* said property in case of the failure or neglect of the purchaser or purchasers, or his or their assigns approved by the court as aforesaid, to comply with any order of the court in respect to the payment of receiver's indebtedness or prior liens claims within thirty days after the service of a certified copy of such order upon such purchaser or purchasers, or his or their assigns. . . .

"It was also ordered, adjudged and decreed that all questions not hereby disposed of and determined be reserved for future adjudication, the settlement of the same being held not to be necessary for the purpose of this decree, and the court reserves the right to make such further orders at the foot of this decree as may seem just and proper." (See Decree, Tr. 188.)

5. That thereafter and on February 27, 1897, appellant filed its further petition of intervention in said cause (Transcript, 189), and therein among other things challenged the validity of said foreclosed mortgages and the right to foreclose the same, and prayed among other things that the decree of foreclosure be set aside; that the pretended consolidations in the intervening petition mentioned be adjudged void, that the mortgages be held invalid, &c.; that the cause on the intervening petition be referred to a commissioner to ascertain and report what assets of the New Albany Company are covered by liens and what assets are not so covered, the amounts and descriptions thereof, and that, among other things, the master be directed to ascertain what portion of the capital stock has not been paid for and amount due thereon, to ascertain the name of the creditors, debts, &c., and what net earnings had accrued and shall hereafter accrue, &c., and that the amount thereof be adjudged and decreed to be a fund to be distributed among the general and unsecured creditors of the company, &c., and such other and further

proceedings be had for the sale of the assets, &c., according to law, &c., that the defendants to this intervening petition to wit, Mills, Jr., the trustee, and the New Albany Company, be required to appear and plead and make answer to the allegations recited in the intervening petition.

6. That, March 9, 1897, appellant moved the court upon the foregoing petition to vacate the decree of foreclosure and sale theretofore entered January 23, 1897, which motion was refused. (Transcript, 198.)

7. That as to all other matters and things contained in said petition the same remain and are now pending in said court for hearing and disposition.

Upon the foregoing statement, and as the same appears in said record, appellees move this court to dismiss the appeal upon the following grounds:

I.

The decree is not final as to appellant.

II.

Appellant is not a party to the decree of foreclosure and sale appealed from.

III.

The decree of foreclosure and sale adjudicated nothing against appellant, and its rights are all reserved for hearing and its interests fully protected by said decree.

IV.

As a floating creditor appellant has no standing in the foreclosure proceeding to challenge or attack the mortgages, and if it had, it can only maintain the same upon its intervening petition now pending in said court for hearing and disposition.

G. W. Kretzinger,
E. C. Field,
A. H. Joline,
Floyd A. Woods,
For Appellees.

And afterwards, on the same day, to wit, on the twelfth day of October, 1897, in the October term last aforesaid, in the record of proceedings thereof, in said entitled cause appears the following entry, to wit:

Tuesday, October 12, 1897.

Before: Hon. James G. Jenkins, Circuit Judge;
Hon. John W. Showalter, Circuit Judge.

The Louisville Trust Company

420 vs.

The Louisville, New Albany & Chicago Railway Company, *et al.*

And now comes the Louisville, New Albany & Chicago Railway Company, by Mr. G. W. Kretzinger and Mr. E. C. Field, its solicitors, and the Farmers Loan and Trust Company and John H. Baker, The Central Trust Company of New York, John H. Stotsenberg and James Murdock as trustees, by Floyd A. Woods, their solicitor, and Frederic P. Olcott, Henry W. Poor, and Henry C. Rouse, by Adrian H. Joline, their solicitor, and move the court to dismiss the appeal; and the court, not now being sufficiently advised, takes this matter under consideration.

And afterwards, to wit, on the twenty-third day of October, 1897, in the October term last aforesaid, in the record of proceedings thereof in said entitled cause, appears the following entry:

Saturday, October 23, 1897.

Before: Hon. William A. Woods, Circuit Judge;
Hon. James G. Jenkins, Circuit Judge;
Hon. John W. Showalter, Circuit Judge.

The Louisville Trust Company

420. vs.

The Louisville, New Albany & Chicago Railway Company, *et al.*

It is ordered by this court that this cause be, and the same is hereby re-set down for hearing November 15, 1897.

And afterwards, to wit, on the fourth day of November, 1897, in the October term last aforesaid, in the record of proceedings thereof, in said entitled cause appears the following entry, to wit:

Thursday, November 4, 1897.

Court met pursuant to adjournment.

Present : Hon. William Woods, Circuit Judge ;
Hon. James G. Jenkins, Circuit Judge.

It is ordered by the Court that Romanzo Bunn, Judge of the District Court of the United States for the Western District of Wisconsin, be designated and assigned to sit as a member of this court during the present session. Thereupon said Bunn appeared and took his seat as a member of said court.

And afterwards, to wit, on the sixteenth day of November, 1897, in the October term last aforesaid, in the record of proceedings thereof, in said entitled cause appears the following entry, to wit :

Tuesday, November 16, 1897.

Court met pursuant to adjournment.

Before : Hon. James G. Jenkins, Circuit Judge ;
Hon. John W. Showalter, Circuit Judge ;
Hon. Romanzo Bunn, District Judge.

The Louisville Trust Company,

420. vs.

The Louisville, New Albany & Chicago Railway Company, *et al.*

Now this day came the parties by their counsel, and this cause now comes on to be heard on the printed record and briefs of counsel and on oral argument by Mr. St. John Boyle and Mr. Swagar Sherley, counsel for appellant, and by Mr. Adrian H. Joline, counsel for appellees ; and the Court, having heard the same, takes this matter under advisement.

And afterwards, to wit, on the fifth day of February, 1898, in the October term last aforesaid, there was filed in the Clerk's office of said Court the opinion of the Court in said cause, which said opinion was in the words and figures following, to wit:

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE SEVENTH CIRCUIT.

October Term, 1897.

The Louisville Trust Company, . . *Appellant,*

No. 420. *versus*

The Louisville, New Albany & Chicago Railway Company, John T. Mills, Jr., The Farmers' Loan and Trust Company, and John H. Barker, Trustees; The Central Trust Company of New York and John H. Stotsenburg and James Murdock, Trustees; Fred. P. Olcott, Henry W. Poor, and Henry C. Rouse.

Appeal from the Circuit Court of the United States for the District of Indiana.

Before JENKINS, and SHOWALTER, *Circuit Judges*, and BUNN, *District Judge:*

On August 24, 1896, John T. Mills, Jr., filed a judgment creditors' bill in the Circuit Court of the United States for the District of Indiana against the Louisville, New Albany and Chicago Railway Company, and procured the appointment of a receiver, who took possession of the property. On November 12, 1896, the Farmers' Loan and Trust Company and John H. Barker, trustees, filed their bill of complaint to foreclose a mortgage upon the property of the railway company, known as the Consolidated Mortage, securing $4,700,000 of six per cent. consolidated bonds. The foreclosure was based upon an allegation that default was made in the payment of the interest upon the bonds secured by said mortgage maturing on October 1, 1896. On the same day the Central Trust Company of New York and John H. Stotsenburg, trustees, filed their bill of foreclosure against the railway company to foreclose the mortgage known as the general mortgage, securing an issue of $2,800,000 five per cent. General Mortgage bonds. This foreclosure was based upon an allegation of default in the payment of interest on the said bonds maturing November 1, 1896. On November 12, 1896, the two foreclosure bills were, by order of the Court, consolidated with the creditors' bill in one cause, to proceed under the title of the Farmers' Loan and Trust Company of New York and John H. Barker, complainants, against Louisville, New Albany and Chicago Railway Company. On December 14, 1896, the Central Trust Company of New York and James Murdock, trustees, filed their bill of foreclosure against the railway company to foreclose the mortgage known as the Equipment Mortgage, securing bonds whereof $709,000 of principal were alleged to be outstanding; the said Equipment Mortgage being a first lien upon a large amount of equipment, and a subordinate lien upon the property of the railway company covered by its other mortgages. The foreclosure was based upon allegations of default in the payment of the interest maturing on December 1, 1896. On December 21, 1896, the last mentioned suit was consolidated with the other consolidated suit under the same title. On December 24, 1896, the Farmers' Loan and Trust Company and John H. Barker, as trustees, filed an amended and supplemental bill, which related to the property of the Orleans, West Baden and French Lick Springs Railway Company, and the Bedford and Bloomfield Railroad Company, which last-mentioned companies had conveyed their properties by way of mortgage to the said trustees as additional security for the Consolidated Bonds. On January 13, 1897, the Orleans, West Baden and French Lick Springs, and Bedford and Bloomfield Companies were made parties defendant to the bill of the Farmers' Loan and Trust Company and John H. Barker. The defendant railway corporations filed an answer to the several bills of foreclosure, which did not put in issue any of the material allegations of said bills. The Central Trust Company, Stotsenburg and Murdock, trustees, filed an answer to the bill of the Farmers' Loan and Trust Company and Barker, admitting the allegations of the bill and amended and supplemental bill of those complainants. On January 23, the pleadings of all the parties defendant to the original bills being upon file, and there being no material allegation of any of the foreclosure bills in issue or denied, and no proofs being necessary in order to render a decree upon the foreclosure bills, application was made to the court for a decree of foreclosure and sale.

On the same day the Louisville Trust Company filed an intervening petition. This petition merely alleged the incorporation of the Louisville Trust Company, the fact that it was the holder of 125 bonds of $1,000 each, made by a corporation known as the Richmond, Nicholasville, Irvine and Beattyville Railroad Company, and alleged to have been guaranteed by the Louisville, New Albany and Chicago Railway Company, which remained unpaid and the interest upon which was in default; that the Louisville, New Albany and Chicago Railway Company was authorized to make the guaranty, and that its right and power to do so had been adjudged in a suit in the Circuit Court of the United States for the District of Kentucky; that the Louisville, New Albany and Chicago Railway Company was indebted to the petitioner in $125,000 and interest; and it prayed that the petition might be filed, and an order entered authorizing petitioner to appear in its own behalf, and in behalf of all others holding similar claims, and take such steps and proceedings as it might be advised by counsel. This intervening petition did not contain allegations tending to controvert any matters contained in the foreclosure bills, and tendered no issue whatever. Upon said petition an order was made that the Louisville Trust Company and the Kentucky National Bank be admitted to appear in the proceedings in the cause, each on its own behalf. No answer or other pleading of any kind was tendered to the court or was ever suggested. On the same day the court made and entered the decree of foreclosure and sale. The decree directed foreclosure of the several mortgages, but reserved full power to adjudge with respect to the income of the receivership and the rights of creditors in and to the same. On February 27, 1897, more than a month after the decree was entered, the appellant filed another petition. In this petition various charges and allegations were made tending to negative the right of the trustee to foreclose their mortgages, and the prayer of the petition was to the effect that the decree of foreclosure and sale should be set aside; that the consolidations by which the mortgagor company was created should be adjudged to be void; that its mortgages should be declared to be invalid; that the assets and liabilities of the railway company should be ascertained, and that the amount of such assets should be delared to be a fund to be distributed among general and unsecured creditors; and, further, that an order be entered commanding some of the parties to the consolidated cause, but not all, to appear within a time to be fixed by the order of the court, and to plead or make answer to the allegations of the petition. No such order was ever made or applied for. But on March 9, 1897, the day before the day fixed for the sale under the decree, it appears that the petition of February 27, 1897, came on to be heard, and was argued by counsel, and that the court refused to vacate the decree of foreclosure and sale, or to postpone or adjourn the sale. The sale was duly made to F. P. Olcott, Henry W. Poor and Henry C. Rouse, as a committee for the bondholders. On the day of the sale, viz., March 10, 1897, application was made to confirm the sale and the master's report, and, all the parties to the foreclosure bills appearing and consenting, an order of confirmation was entered. The Louisville Trust Company on

May 1, 1897, filed its petition of appeal and assignment of errors, and said petition was allowed. The appeal is taken from the decree of foreclosure and sale, and from the order denying the application to set the same aside.

BUNN, *District Judge*, after stating the fact as above, delivered the opinion of the Court.

There are several reasons why the decree in this case should not be disturbed.

1. The intervening petitioner, who is the appellant here, had no standing in the court below. At best it was only a general creditor of the defendant company, having and claiming to have no interest in or lien upon the real estate and franchises of the company which formed the subject of the foreclosure suits. The petitioner claims to be the owner and holder of certain bonds issued by the Richmond, Nicholasville, Irvine and Beattyville Railroad Company, the payment of which was guaranteed by the defendant, the Louisville, New Albany and Chicago Railway Company, which bonds remain unpaid. It is well settled that in a foreclosure proceeding like this, unsecured creditors having no judgment or other lien upon the real estate, can not be made defendants. They are neither necessary nor proper parties. *Bronson* v. *Railroad Company*, 2 Black, 524; *Stout* v. *Lye*, 103 U. S. 66; *Herring* v. *Railroad Company*, 105 N. Y. 340; *Jones* v. *Winans*, 20 N. J. Eq. 96. In the case of *Bronson* v. *R. R. Co. supra*, it is said: "But was it ever seriously maintained that a general creditor, having no specific lien, had a right to interfere in the contests between his debtor and third parties? * * * If the right was conceded to one creditor it would have to be to another, and where the creditors are numerous, as in the case of railroad bondholders, the exercise of the right would lead to great embarrassment."

In the New Jersey case cited a general creditor had presented a petition, asking to be made a party defendant in a foreclosure case, and the Chancellor said: "The petitioner has no judgment or other lien on the land; he is in the position in which any creditor at large of Winan stands. No such creditor is a necessary party to a bill to foreclose; nor could he be properly made a defendant. There is no authority or precedent for such an order as is asked for in this case, and it is against the settled principles on which the practice of the court is founded."

In the case at bar, no doubt, the Circuit Court exercised a discretion in allowing the appellant to come in, in order that it might be in condition to keep an eye on the proceedings and to be ready to protect its interests in any surplus that might remain after the bondholders and other secured creditors were paid. The petitioner, after being allowed to file its petition, did not tender any issue nor ask leave to file any answer or pleading, so that there was no occasion for the complainants to offer any evidence to substantiate the allegations of the bill, but a decree of foreclosure was regularly and properly rendered upon the bill and answers. Now the appellant comes to this court and asks for all the benefit and advantage that it might have had if it had asked and obtained leave to put in an answer, and had produced evidence to defeat the equities of the bill. We know of no precedent for such a practice ; it would be a travesty upon equity proceedings. The case stands here as though the equities of complainant's bill had been established by competent and sufficient evidence in the court below.

The appellant's original petition alleged nothing whatever against the foreclosure of the validity of the mortgages, or the equities of the complainant's case, but merely set up facts which would entitle the petitioner to share in any surplus or assets not covered by the mortgages. It was filed on the same day that the decree was entered. The complainants were not notified that there was any dispute as to the merits of the foreclosure. What should the complainants do ? Must they delay the foreclosure and coax the petitioner to put in an answer disputing their right to the relief sought ? There was nothing secret about the foreclosure proceedings. They had been pending for some time and the case was ripe for a decree, which was regularly entered upon bill and answer.

2. The sole ground of objection to the complainant's case in the Court below as set forth in the petition of appellant, and which was filed after a decree was taken, and which was addressed to the discretion of the Court asking to have the decree set aside, was the total invalidity of the various bonds and mortgages because the defendant corporation which is a consolidated company was never regularly consolidated, and that under the law of Illinois and the decision of the Supreme Court in the case of *American Loan and Trust Co.* vs. *Minnesota Co.*, 157 Ill. 741 (47 N. E. Rep. 153), a railway corporation of Illinois could not be consolidated with a railway corporation of another state.

In answer to this claim it is alleged on the part of the appellees that there was no property of the defendant company in Illinois except some leasehold interests, and that an examination of the case in the Illinois Supreme Court shows that it has no application to such a case as this ; and that it is well settled law that in an action to foreclose a mortgage securing bonds of a consolidated corporation of two different states, where from the time of consolidation it exercised the franchises of a consolidated corporation without objection from the state or the stockholders who appeared and voted as its stockholders at its annual meetings, it is a de facto corporation, and both such de facto corporation and its stockholders and creditors who claim to be general creditors of the same de facto corporation, are estopped to assert its unauthorized existence as a corporation to avoid the bonds ; which no doubt furnishes a complete answer to the contention, provided it were essential to meet that contention here on the merits as though it had been litigated and passed upon in the court below, and an appeal taken from the decision.

The case of *Farmers' Loan and Trust Co.* v. *Toledo*, 67 Fed. Rep., is directly in point upon this question. See also *Dallas County* v. *Huidekoper*, 154 U. S. 654. Both the appellants and appellees have dealt with this defendant corporation as though it had a legal existence. One who deals with a corporation as existing in fact is estopped to deny, as against the corporation that it has been legally organized. *Close* v. *Glenwood Cemetery*, 107 U. S. 466. In the recent case of *Continental Trust Company* v. *Toledo, St. L. & K. C. R. Co.*, 82 Fed. Rep. 642, a similar question was presented and the petitioner's right to allege the invalidity of bonds denied. In that case, which like this was one of several bills consolidated, the parties were allowed to come in and defend, on the ground that some of the cases consolidated were not foreclosure cases but suits brought by unsecured creditors in the nature of creditors' bills, it being conceded that in a foreclosure bill a general creditor could not contest the validity or the amount of the mortgage lien. The bondholders, however, had made themselves parties to the creditor's bill by a committee, and had set up their claims and liens, and on this ground the creditors were allowed to attack the validity of the bonds secured by mortgage. But the court, when it came to the question of the creditors alleging the invalidity of the bonds on the general ground that the corporation had no valid existence, distinctly denied such right. On that question, Taft, Circuit Judge, in his opinion says : "Let us consider first the averment that the Toledo, St. Louis & Kansas City Railroad Company is neither a corporation de jure nor a corporation de facto.

"Can such a defense be urged by one purporting to be a creditor of the pretended corporation ? If the bonds are null and void because the corporation issuing them was a nullity, clearly the debts of the petitioners and the complainant are in no better condition, and the Court has nothing upon which to exercise its jurisdiction. * * * So long as they (the petitioners) owe their right to be in court at all to the sufficiency of the averments of the bill for the relief asked, they can not be heard to question the very basis upon which alone the court can act. If it is true that the defendant in the bill is not an entity at all, but only an empty name and nullity, the bill must fail for want of a defendant, and with it must fall all the petitions herein. * * * It hardly seems necessary to point out that a defense urged by one creditor against the claim of another, which must defeat, not only that at which it is aimed, but also that of the complainant and all other claims, and which denies the existence of the defendant against whom the action was brought, can not be permitted to an intervenor."

These remarks are peculiarly applicable to the case at bar, where the appellant occupies the anomalous attitude of denying the capacity of the defendant corporation to issue its own bonds to secure its own indebtedness and to enable it to carry on its own business, while claiming that it had power to guarantee the bonds of another Railroad Company. Such a contention can not be allowed. There is a motion in the case to dismiss the appeal which need not be considered.

The decree of the Circuit Court is affirmed.

And afterwards, on the same day, to wit: on the fifth day of February, 1898, in the October term last aforesaid, in the record of proceedings thereof, in the said entitled cause appears the following entry, to wit:

Saturday, February 5, 1898.

Before: Hon. James G. Jenkins, Circuit Judge;
Hon. John B. Showalter, Circuit Judge;
Hon. Romanzo Bunn, District Judge.

The Louisville Trust Company,

420 vs.

The Louisville, New Albany & Chicago Railway Company, *et al.*

Appeal from the Circuit Court of the United States for the District of Indiana.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Indiana and was argued by counsel.

On Consideration Whereof, it is now here ordered, adjudged, and decreed, by this court, that the decree of the said Circuit Court, in this cause be, and the same is, hereby affirmed with costs.

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE SEVENTH CIRCUIT.

I, Oliver T. Morton, Clerk of the United States Circuit Court of Appeals, for the Seventh Circuit, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 229 inclusive, contain a true copy of the transcript of the record and proceedings in the United States Circuit Court of Appeals for the 7th Circuit in the case of

Louisville Trust Company,

vs.

Louisville, New Albany & Chicago Railway Company, *et al.*

No. 420, October Term, 1896, as the same remains upon the files and records of said United States Circuit Court of Appeals, for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of the said United States Circuit Court of Appeals, for the Seventh Circuit, at the City of Chicago, this 21st day of February, A. D. 1898.

(Signed) Oliver T. Morton,
Clerk of the United States Circuit Court of Appeals
for the Seventh Circuit.

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the seventh circuit, Greeting:

Being informed that there is now pending before you a suit in which The Louisville Trust Company is appellant and The Louisville, New Albany & Chicago Railway Company *et al.* are appellees, which suit was removed into the said circuit court of appeals by virtue of an appeal from the circuit court of the United States for the district of Indiana, and we being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 27th day of April, in the year of our Lord one thousand eight hundred and ninety-eight.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

[Endorsed:] Supreme Court of the United States. No. 613, October term, 1897. The Louisville Trust Company *vs.* The Louisville, New Albany & Chicago R'y Co. *et al.* Writ of certiorari. Filed Sep. 6, 1898. Oliver T. Morton, clerk.

UNITED STATES OF AMERICA,
Seventh Circuit, } *ss:*

In obedience to the command of the foregoing writ of certiorari and in pursuance of the stipulation of the parties, a full and true copy of which is hereto attached, I do hereby certify and return that the transcript of the record filed with the application to the Supreme Court of the United States for a writ of certiorari in the case of The Louisville Trust Company, appellant, *vs.* The Louisville, New Albany & Chicago Railway Company *et al.*, appellees, is a full, true, and complete transcript of the record upon which said cause was heard in the United States circuit court of appeals, together with all proceedings in said court.

Seal United States Circuit Court of Appeals, Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals for the seventh circuit, at the city of Chicago, Illinois, this sixth day of September, A. D. 1898.

OLIVER T. MORTON,
Clerk United States Circuit Court of Appeals
for the Seventh Circuit.

Supreme Court of the United States, October Term, 1897.

LOUISVILLE TRUST COMPANY *vs.* THE LOUISVILLE, NEW ALBANY & CHICAGO Railway Co., &c.	No. 613. Stipulation.

Whereas the Supreme Court of the United States has in the above-entitled cause, upon the petition of the Louisville Trust Company, awarded a writ of certiorari addressed to the honorable the judges of the United States circuit court of appeals for the seventh circuit, commanding them to send to the said Supreme Court the record and proceedings in the said cause:

Now, it is agreed between the parties that the certified copy of the transcript now on file in the office of the clerk of the United States Supreme Court, No. 613, may be taken as a return to the writ, and that the clerk of the said court of appeals may certify this stipulation as a return to the said writ.

ADRIAN H. JOLIME,
Of Counsel for Certain Def'ts.
G. W. KRETZINGER,
E. C. FIELD,
ST. JOHN BOYLE, *For App't.*

Endorsed: United States Supreme Court, October term, 1897. No. 613. Louisville Trust Co. *vs.* Louisville, New Albany & Chicago Railway Co. *et al.* Stipulation. Filed Sep. 6, 1898. Oliver T. Morton, clerk.

[Endorsed:] Case No. 16,826. Supreme Court U. S., October term, 1898. Term No., 263. The Louisville Trust Co., petitioner, *vs.* The Louisville, New Albany & Chicago Railway Co. *et al.* Writ of certiorari and return. Office Supreme Court U. S. Filed Sep. 8, 1898. James H. McKenney, clerk.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1897.

EX-PARTE

THE LOUISVILLE TRUST COMPANY.

PETITION FOR WRIT OF CERTIORARI requiring the Circuit Court of Appeals for the Seventh Circuit to certify to the Supreme Court of the United States, for its revision and determination, the appeal taken by the Louisville Trust Company against the Louisville, New Albany & Chicago Railway Company and others; and

BRIEF IN SUPPORT OF SAME.

ST. JOHN BOYLE,
SWAGAR SHERLEY,
COUNSEL FOR PETITIONER.

JOHN P. MORTON & CO., PRINTERS, LOUISVILLE.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SEVENTH CIRCUIT.

THE LOUISVILLE TRUST COMPANY, - - *Appellant,*

[No. 420] *VERSUS*

THE LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY COMPANY; JOHN T. MILLS, JR.; THE FARMERS LOAN AND TRUST COMPANY AND JOHN H. BARKER, TRUSTEES; THE CENTRAL TRUST COMPANY OF NEW YORK AND JOHN H. STOTSENBERG AND JAMES MURDOCK, TRUSTEES; FRED P. OLCOTT, HENRY W. POOR, AND HENRY C. ROUSE, - - - - - *Appellees.*

NOTICE.

You are hereby notified that on Monday, the ~~4th~~ 11th day of April, 1898, the appellant, the Louisville Trust Company, will present a petition to the Supreme Court of the United States, in the City of Washington, District of Columbia, and will move the court for a writ of certiorari or other process, to be addressed to the Circuit Court of Appeals for the Seventh Circuit, to certify to the said Supreme Court for its review and determination the record in this case, and for such other and further process as may be needful and proper.

ST. JOHN BOYLE,
SWAGAR SHERLEY,
Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1897.

Ex Parte—The Louisville Trust Company.

MOTION.

Now comes the Louisville Trust Company, of Louisville, Kentucky, by St. John Boyle and Swagar Sherley, as counsel, and moves this Honorable Court that it shall by certiorari or other proper process directed to the Honorable the judges of the United States Circuit Court of Appeals for the Seventh Circuit, require said court to certify to this court, for its review and determination, a certain cause in said Court of Appeals lately pending, wherein the Louisville Trust Company was appellant, and the Louisville, New Albany & Chicago Railway Company and others were appellees, and to that end now tenders herewith its petition, together with a certified copy of the entire record in said cause in said Circuit Court of Appeals.

St. John Boyle,
Swagar Sherley,
Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1897.

Ex Parte—THE LOUISVILLE TRUST COMPANY.

PETITION.

PETITION FOR WRIT OF CERTIORARI REQUIRING THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT TO CERTIFY TO THE SUPREME COURT OF THE UNITED STATES, FOR ITS REVISION AND DETERMINATION, THE APPEAL TAKEN BY THE LOUISVILLE TRUST COMPANY AGAINST THE LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY COMPANY AND OTHERS.

To the Honorable, the Chief Justice and Associated Justices of the Supreme Court of the United States:

This petition of the Louisville Trust Company respectfully represents as follows:

First: Your petitioner is a corporation of the State of Kentucky. The Louisville, New Albany & Chicago Railway Company is a corporation of the State of Indiana; John T. Mills, jr., John H. Barker, and John H. Stotsenberg are citizens of the State of Indiana; the Farmers Loan and Trust Company and the Central Trust Company of New York are corporations of the State of New York, and Fred P. Olcott, Henry W. Poor, and Henry C. Rouse are citizens of the State of New York.

Second: The Louisville, New Albany & Chicago Railway Company, hereinafter called the "Monon," at the time of the institution of the original suit was the owner of and then operating a system of railroad embracing 537 miles of main line and extending from the City of New Albany to Michigan City, with a division extending from the City of Indianapolis to Hammond, and had leases and trackage rights from Hammond into Chicago, Ill., and from New Albany into Louisville, Ky.

Its capital stock was $16,000,000, and its mortgage debt was of five classes:

(1) $3,000,000 six per cent bonds of date July 1, 1880, upon the main road between New Albany and Michigan City, together with the equipment, appurtenances, franchises, etc., and known and called Main Line Bonds.

(2) $2,300,000 six per cent bonds of date August 1, 1881, secured by a mortgage on the road from Indianapolis to Hammond, and known and called Air Line Bonds.

(3) $4,700,000 six per cent consolidated bonds secured by a mortgage upon the entire railroad equipment, etc., of date January 1, 1886, and known and called "Consolidated Bonds."

(4) $2,800,000 five per cent general mortgage bonds secured by a lien upon the entire railroad, equipment, etc., of date May 1, 1890, and known and called "General Mortgage Bonds."

(5) $1,000,000 five per cent equipment bonds secured by a first mortgage upon and title to a large amount of equipment, and a junior lien upon the entire railroad equipment, etc., of date September 1, 1894, and known and called "Equipment Bonds."

On the 24th day of August, 1896, the appellee, John T. Mills, jr., in the Circuit Court of the United States for the District of Indiana, recovered a judgment against the "Monon" Railroad for the sum of $494,911.25 and costs, and on the *same day* an execution was issued and returned unsatisfied. The *same day* Mills filed his bill in equity in same court, in behalf of himself and other creditors, alleging the insolvency of the "Monon," and the need of a receiver to preserve its property and prevent a multiplicity of suits, and prayed that "the court will fully administer the trust fund in which the complainant is interested as a judgment creditor, and will for such purpose marshal all the assets of said insolvent corporation, and ascertain the several liens and priorities existing upon the said system of railways, or any part thereof, and the amount due upon each and every of such liens, whether by mortgage or otherwise, and enforce and decree the rights, liens, and equities of each and all the creditors of the said Louisville, New Albany & Chicago Railway Company, as the same may be ascertained and decreed by the court upon the respective claims and interventions of several of such creditors or lienors in and to not only the said line of railroad appurtenances and equipment, or any part of them, but also to and upon each and every portion of the assets and property of the said insolvent corporation, and that said railroad and all the assets of such corporation shall be sold by proper decree of the court, and the proceeds divided among the different creditors according as their liens and priorities may be decreed by the court, and for such other and further relief as to the court may seem proper, and as may be necessary to further enforce the rights and equities of the complainant and all other creditors of such corporation. (Record, pp. 8, 9.)

On the same day the railway company entered its appearance, and, as appears from the recital in the order appointing a receiver (p. 10), though the answer is not part of the record, filed its answer admitting the material allegation of the bill, and acquiesced in the appointment of a receiver for its property; and accordingly, *on the same day*, Wm. H. McDoel, the general manager of the "Monon," was appointed receiver and took immediate possession of the property.

At this time there had been no default made by the "Monon" in the payment of the interest on any of its bonded indebtedness.

On the 12th day of November, 1896, the Central Trust Company of New York, and John H. Stotsenberg, the trustees in the deed of trust given to secure the fourth class of bonds above mentioned and described as general mortgage bonds, filed their bill of complaint in said Circuit Court against the Monon Company, and against the trustees under the deeds of trust securing the third and fifth classes of indebtedness above set out, to wit: Farmers Loan & Trust Company and John H. Barker, trustees under the deed of trust given to secure the "Consolidated Bond" issue, and James Murdock, who, with said Farmers Loan & Trust Company, was trustee under the deed of trust given to secure the "Equipment Bond" issue. Said Central Trust Company alleged a default in the payment of the interest on the general mortgage bonds due November 1, 1896, amounting to $70,000, and prayed for the appointment of a receiver and a foreclosure of its mortgage. On the same day the Farmers Loan & Trust Company and Barker filed their bill of complaint against the Monon Company, the Central Trust Company, James Murdock, and John H. Stotsenberg, and alleging a default in the payment of interest on the Consolidated Mortgage bonds due October 1, 1896, prayed for the appointment of a receiver and sale of the mortgage property. On the same day the suits of the two trust companies were consolidated under the name of Farmers Loan & Trust Co., &c., against the Louisville, New Albany & Chicago Railway Company, and on the same day an order was entered consolidating that suit with the said suit of Mills under the title given the consolidated suit of the trust companies, and the receivership of McDoel was extended to the consolidated case.

A month later the Central Trust Co. and Murdock filed a bill of complaint alleging default in the payment of interest on the "Equipment" bonds, and prayed for a foreclosure and sale under their mortgage, and on the 21st day of December, 1896, by consent this cause is consolidated with the consolidated suit above mentioned. An amended bill of complaint is filed by the Farmers Loan & Trust Co., making the Orleans, West Baden & French Lick Springs Railway Company, and the Bedford & Bloomfield Railroad Company parties, and praying a foreclosure of mortgages given by said companies. On December 24, 1896, the Receiver asks and obtains permission to pay the interest coupons soon to mature on the bonds belonging to the first and second class of securities herein set out. On the 19th day of January, 1897, the Louisville, New Albany & Chicago Railway Co., and the Orleans, West Baden & French Lick Springs Company, and the Bedford & Bloomfield Railway Company filed their answer *admitting every material allegation in each of the bills of complaint,* and on the 23d day of January the Central Trust Co. and John H. Stotsenberg, and the Central Trust Co. and James Murdock file their answer, admitting the allegations in the bill of complaint of the Farmers Loan and Trust Company.

The same day the appellant Louisville Trust Co. filed its intervening petition, and *it was ordered that it be admitted to appear in the proceedings in this case in its own behalf.* (R. p. 166.)

Third: By its intervening petition the Louisville Trust Company represented to the Court that it is the holder of 125 of Richmond, Nicholasville, Irvine & Beattyville Railroad Company $1,000 bonds, which had been endorsed and guaranteed for value by the "Monon," and which bonds had been matured by default in interest, and that by reason thereof it was a creditor of the "Monon" to the extent of $125,000. *The very same day* the Court entered a decree foreclosing the three mortgages set out in the bills of complainant, and ordered a sale of the entire property of the Monon, the proceeds of the sale, less the costs of foreclosure, to be applied in its entirety on the bonded debt. On the 27th day of February, 1897, the Louisville Trust Company filed a second intervening petition, in which it set out in detail its claim as creditor, and alleged that the orders entered in the case and the decree had been obtained by collusion between Mills and the other complainants and the railroad company, for the purpose of obtaining the property of the Monon without the payment of the general creditors, and prayed that the decree be opened and the sale postponed, the case referred to a commissioner to ascertain debts, liens, etc., the net earnings of the road in the hands of the receiver, and that further proceedings be had for the sale of the assets of the company and a distribution thereof. On the 9th of March the Court refused to open the decree or postpone the sale, and on the 10th day of March the road was sold, and *the same day the report of sale was filed, and on the same day the report was confirmed.* On May 1, 1897, an appeal was prayed by the Louisville Trust Company to the Circuit Court of Appeals for the Seventh Circuit, and was granted.

Fourth: The cause on appeal having been heard before Jenkins and Showalter, Circuit Judges, and Bunn, District Judge, the opinion of the Court was delivered on the 5th day of February, 1898, by Bunn, District Judge, affirming the decree of the lower court. (Record, pp. 217–23.)

Fifth: The decision holds, first, that appellant, being a general creditor without lien, had no standing in the court below, ignoring the fact that the Circuit Court got jurisdiction of the cause by virtue of a general creditors' bill brought on behalf of all creditors of the "Monon." The opinion is based on the idea that the suit into which the appellant came as intervenor was simply a suit between mortgagor and mortgagee, and the authorities cited are instances of that kind of a suit only. Petitioner represents that this decision is directly in conflict with the recent decision rendered by the Circuit Court of Appeals for the Sixth Circuit in the case of Continental Trust Co. v. Toledo, St. L. & K. C. R. R. Co., 82 Fed. Rep. 642. In that case, Taft, Judge, expressly holds that an unsecured creditor may intervene in a consolidated cause, where one of the suits consolidated was a general creditors' suit.

Sixth: The court fails to consider the most strongly contested point in the case, viz., the right to a foreclosure of the mortgage given to the Farmers Loan and Trust Company and John H. Barker, until a default had existed for six months. The failure of the court to discuss this point is not due to its decision that appellant had no standing in court, for the opinion, instead of stopping there, discusses "as the sole ground of objection to the complainant's case, . . ." the question of the validity of the mortgages made by the consolidated "Monon." The statements of facts in the opinion are inaccurate in vital particulars, and in none more so than the statement that no other questions were raised than those the opinion discusses.

Seventh: On the same day that the sale was had the report of the sale was filed, and an order of confirmation of the sale was then entered. This order purported to have been entered by the consent of all the parties except the intervening creditors. They were not present, were not notified, and no opportunity was given them to except to the sale. It divested them of all right to redeem the property, and it is settled that an appeal will lie therefrom.

Blossom v. R. R. Co., 1 Wall. 65;
Sage v. R. R. Co., 96 U. S. 712.

The failure to give an opportunity for excepting to the sale was contrary to the practice in England, and which has been adopted by the United States Courts of Equity.

Pewabic Mining Co. v. Mason Co., 145 U. S. 349–364.

Eighth: The bill of John T. Mills, jr., by which the Circuit Court obtained possession of the property of the "Monon" and jurisdiction in the foreclosure suits, states the facts growing out of the guaranty by the "Monon" of the Richmond, Nicholasville, Irvine & Beattyville R. R. Company, the decision of the Circuit Court of Appeals for the Sixth Circuit, holding said guaranty valid and binding on the "Monon," and that thereby an indebtedness of $1,000,000 is recognized as existing against the "Monon," and that various parties holding claims growing out of the guaranty are seeking and will seek to enforce same, and will hamper and prevent the proper management of the "Monon" as a railroad system, and that the "Monon" in insolvent, and a receiver should be appointed. (R. pp. 4, 5, and 6.) In other words, this litigation was originally commenced to prevent many suits being brought by holders of guaranteed bonds, and to shut out, as subsequent events showed, such persons from any share in the proceeds of the "Monon's" property.

Petitioner represents that this Court has, by its writ of certiorari, caused the record in the cases wherein the decision was rendered holding the "Monon" liable on its guaranty, to be certified up to it by the Circuit Court of Appeals for the Sixth Circuit, for its review and determination; that the case at bar is an outgrowth of the suits certified to this Court, and that full justice can only be done the parties interested in all these suits by this Court directing this cause to be certified to it, that all branches of the litigation may be examined and determined by one Court.

Wherefore, your petitioner prays that a writ of certiorari may be issued out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding said court to certify and send to this court a full and complete transcript of the record in all proceedings of the said Circuit Court of Appeals in the case therein entitled Louisville Trust Company v. Louisville, New Albany & Chicago Railway Company, etc., and numbered 420, to the end that the said case may be reviewed and determined by this court, as provided by law, and that the judgment of the said Circuit Court of Appeals in the said case may be modified so as to reverse the judgment of the Circuit Court and grant the prayer of the petitioner in its original petition.

And so your petitioner will ever pray.

St. John Boyle,
Swagar Sherley,
Counsel for Petitioner.

State of Kentucky, } *Sct.*
Jefferson County. }

Swagar Sherley, being duly sworn, states that he is one of the counsel for the Louisville Trust Company, the petitioner named, that he has read the foregoing petition, and the facts therein stated are true, as he believes.

Swagar Sherley.

Subscribed and sworn to before me this 14th day of March, 1898. My commission expires January 12, 1902.

Sam'l J. Secor,
Notary Public, Jefferson County, Ky.

Supreme Court of the United States.

THE LOUISVILLE TRUST COMPANY, *Appellant*,

VERSUS

THE LOUISVILLE, NEW ALBANY &
CHICAGO RAILWAY COMPANY, &c., *Appellees*.

**Brief for the
Petitioner,
The Louisville
Trust Company,
on Application
for Writ of
Certiorari.**

This case affords a brilliant example of how to foreclose a railroad. None but a court of experience and practice could have administered the law so speedily and gently as was done in this proceeding.

A prosperous railroad company, and which had never made a default in payment on its mortgage bonds and with no installment of interest falling due for several months, was, with its own consent, gently taken into the custody of the United States Circuit Court for the District of Indiana. The Vice-President and General Manager of the corporation, under whose control the corporation had so prospered, was selected by the court as its receiver. Having deprived the company of its revenue, it happened—as must have been foreseen—that on October 1, 1896, an installment of interest became due, amounting to $141,000, and was not paid, and so far as appears, no effort on anybody's part was made to have it paid; and afterward, on November 1st, an additional $70,000 became due, and like default was made. During this month the Receiver was, indeed, authorized to borrow $200,000 for different purposes, including making a new alignment of track, etc., but nothing was said about paying the defaulted interest and saving the forfeiture occasioned thereby. A final decree of foreclosure and sale was entered on the 23d day of January, 1897, directing the property of the company to be sold, for the purpose of paying the interest in default. This was within five months after the court had assumed the operation of the road, and within sixty days after the default on November 1st. The sale was made on March 10th, and on the same day was confirmed and the property directed to be conveyed and turned over. And there the record ends. In fact, the late Receiver again became the Vice-President and General Manager of the new corporation, but the officers and the stockholders are the same as of the old. No change has occurred except that the ticker in Wall Street records the sale of C. I. L. instead of L. N. A. As the court in the first instance seized the property for the purpose of distributing the assets among the creditors of the corporation, the result has been, and the *only* result, to obliterate the claims of the creditors and to deliver to the stockholders all of the assets, free from the claims of their unsecured creditors.

The only thing that disturbed the even tenor of the proceeding was the intervention of two of the creditors of the Railroad Company for the purpose of protecting their interest, if it were possible. The original creditors' bill, and the bills of foreclosure by the mortgagees, subsequently filed, had been consolidated, but no step or order was ever taken in the consolidated case looking toward the bringing in of other creditors, or the giving notice to them of the proceedings, in order that they might be heard. On the day before the decree was entered, January 23, 1897, the Louisville Trust Company and the Kentucky National Bank filed their petitions, alleging that they were creditors of the Louisville, New Albany & Chicago Railway Company, and that they had been adjudged to be such creditors in a suit in the United States Circuit Court for the District of Kentucky, and prayed to be allowed to appear in their own behalf and in behalf of all other creditors, and take such steps and proceedings as they might be advised. And it was thereupon ordered that the Louisville Trust Company and the Kentucky National Bank should be admitted to appear in the proceedings in the case, each in its own behalf.

The same day the decree of foreclosure was entered. Afterwards, and before the sale, but within thirty-five days of the order allowing it to intervene, the Louisville Trust Company filed another petition, in which it set out at length its claim and the proceedings under which it had been adjudged to be a creditor of the corporation, and prayed that the decree of foreclosure entered in the cause be set aside, and that the cause be referred to a Master to ascertain and report upon the assets of the Company, and for the bringing in of creditors entitled to distribution thereof. The court refused to vacate the decree, and refused to postpone or adjourn the sale.

The ground upon which the Trust Company filed its petition is as follows:

> "And the petitioner further says that afterwards John T. Mills, jr., instituted a suit against the said New Albany Company in the United States Circuit Court for the District of Indiana on August 24, 1896, and the said company appeared thereto and confessed judgment; and on the same day a writ of *fieri facias* was issued thereon, and on the same day was returned wholly unsatisfied; and thereupon, on the same day, the said John T. Mills, jr., filed his bill of complaint herein and moved for the appointment of a receiver to take charge of all the assets and properties of the said defendant company, and to which the said company appeared and confessed the allegations of the bill of complaint; and thereupon W. H. McDoel was appointed receiver, who had theretofore been the General Manager of the said Company. And the petitioner charges that the said John T. Mills, jr., claimed to be a creditor to the amount of $494,911.35, but did not disclose or discover to the court in his proceedings that he was not a general creditor, but he was at the time, if a creditor at all, secured with collateral securities, the value of which is unknown to your petitioner. And the petitioner charges that the proceedings in behalf of the said John T. Mills, jr., were procured by the said New Albany Company for the purpose of hindering and delaying the general or unsecured creditors of the said company in the enforcement of their debts; and that since the entry of the said order of appointment no step has been taken in the said cause, either to ascertain or

to bring into court the assets which are subject to the payment of the said debts, and no proceeding has been taken to notify or to bring before the court the said general or unsecured creditors; that afterwards, on November 12, 1896, the Farmers Loan & Trust Company filed its bill against the said New Albany Company to foreclose the mortgage executed to the complainant as trustee, dated January 1, 1886, to secure an issue of ten millions of dollars of bonds; and also on the same day the Central Trust Company filed its bill of complaint to foreclose a mortgage executed by the said New Albany Company to the Central Trust Company and John H. Stotsenberg, trustees, on May 1, 1890. And on the same day, November 12, 1896, an order was entered herein consolidating the said causes and extending the receivership under such bills; and thereafter, on the 23d day of January, 1897, a decree was entered herein foreclosing the said mortgage and ordering a sale of the mortgaged properties, and all of which was done *before there was a right to have such decree entered,* and without bringing before the court the general or unsecured creditors so that they might be heard in their own behalf.

"*And the petitioner further says that prior to the entry of the said decree the holders of the bonds secured by the mortgages to the Farmers Loan and Trust Company and the Central Trust Company aforesaid, and the holders of the preferred and common stock of the said Louisville, New Albany & Chicago Railway Company, or a part thereof, had entered into an arrangement or agreement for the purpose of procuring the sale of the said property, its purchase by and in behalf of the parties entering into such combination, and a reorganization thereof, and the issue of securities to the said parties, including said stockholders, without the payment of the debts and liabilities of the said company, and for the purpose of hindering and delaying the said creditors,* and with a view to prevent the collection or enforcement of such debts and liabilities; and that the said decree of sale was obtained by the said company and said complainants in order to carry out such unlawful purpose and to prevent the general or unsecured creditors of the said company from having an opportunity to be heard in matters arising in the said cause."

The petition further averred that the Louisville, New Albany & Chicago Railway Company was an Indiana corporation, and was afterwards declared to be a corporation of the State of Kentucky by an act of its Legislature passed in 1880; that afterwards this Indiana corporation undertook to consolidate with a company known as The Chicago & Indianapolis Air Line Railway Company, which purported to be a consolidated corporation under the laws of the States of Illinois and Indiana; that this consolidation was formed by a pretended union of the Chicago & Dyer Railway Company, of Illinois, and The Chicago & Indianapolis Airline Railway Company, of Indiana, but that, in matter of law, the attempted consolidation between these two companies was, by the law of the State of Illinois, absolutely void; and that the consolidated company did not become a corporation of the State of Illinois, and acquired no power or authority to execute any mortgages or issue securities thereon upon property within the State of Illinois, and that this had been so determined by the Supreme Court of that State in the case of the American Loan & Trust Co. v. The Minnesota Co., 157 Ill. 641, and it was claimed, therefore, that the mortgages were void.

It is interesting to note, it this connection, that in the case which your Honors have ordered to be certified from the Court of Appeals of the Sixth Circuit, and which was heard below by Justices Jackson and Brewer, it was held by them that this consolidation, which had ignored the existence of the Kentucky corporation, was an abandonment of its corporate powers in Kentucky, and that it ceased to exist as a Kentucky corporation. This was before the Illinois court had decided such consolidation was without warrant of law; and the controversy now pending before you, on the question of whether or not that Railway Company was, and continues to be, a corporation of Kentucky, may largely depend upon this consideration.

The Court, however, refused to set aside the decree or to postpone the sale, and thus effectually prevented the plaintiff from any hearing upon its intervening petition. In other words, no opportunity was afforded to substantiate its allegations. Therefore, the sale took place the next day, and on the same day the sale was confirmed by the consent of the parties, with the exception of the Louisville Trust Company and the Kentucky National Bank. These creditors were not present, had no notice that such an application would be made, and *no time was given in which to file exceptions to the sale.* The title and possession of the property was gone, as far as the court could pass the one or surrender the other.

The only thing left for the creditors was to appeal from the decree, or file a bill of review to impeach the proceedings for fraud. But the latter course seemed to have been barred because the court had refused to set aside the sale on the application of these creditors. The thing had been adjudged between them. Therefore, the Louisville Trust Company filed its petition, and was granted an appeal to the Circuit Court of Appeals, and the appellees entered a motion to dismiss the appeal on the ground that the creditors had no standing in court, and therefore, not entitled to appeal. The Circuit Court of Appeals, however, did not dismiss the appeal, though it decided that the Louisville Trust Company did not have any standing in court; and thereupon, ignoring some of the points in the case, selected one, decided it against the appellant, and *affirmed the judgment.* If the appellant had sufficient standing in court to raise any question on this appeal, surely the court should not have ignored the most important ones in the case.

II.

THE APPELLANT'S STANDING IN COURT.

The Circuit Court of Appeals decided that the appellant "had no standing in the court below. At best it was only a general creditor of the defendant company, having and claiming to have no interest in or lein upon the real estate and franchises of the Company, which formed the subject of the foreclosure suits." The Court thereupon cited authorities in support of the well-known rule that general creditors are neither necessary nor proper parties in a suit of foreclosure.

In answer to this it may be stated that this was not a suit for foreclosure. The bill under which the court seized all the property and assets of the Railway Company, including the equity of redemption, was framed in behalf of all creditors and for a final distribution of all the properties of the insolvent corporation. The prayer of the Bill (Record, page 8) is as follows:

> " For the purpose of enforcing the rights of complainant and all other creditors of said insolvent corporation according to their due equities and priorities, and to preserve the unity of the said railway system as it has been and now is maintained and operated, and to prevent the disruption thereof by the separate attachments, executions, or levies, this court will forthwith appoint a receiver for the railroad property, choses in action, and assets of every description wherever situated belonging to the said defendant corporation, with authority to manage and operate the same as the officer of and under the protection of this court, with the usual powers of a receiver in such cases, and that all of the officers, managers, superintendents, and employees of the said railway company shall be ordered and required forthwith to deliver up possession of all and singular every part of the said property of said insolvent corporation over which the said receiver is thus appointed, and shall also deliver over all books of account, offices, vouchers, and papers in any way relating to the present business or operation of said system of railway, and shall be restrained from interfering in any way whatever with the possession and control of the receiver over any part of the said property so delivered to him. That the court will fully administer the trust fund in which the complainant is interested as a judgment creditor, and will for such purpose marshal all the assets of said insolvent corporation and ascertain the several liens and priorities existing upon the said system of railways or any part thereof, and the amount due upon each and every of such liens, whether by mortgage or otherwise, and enforce and decree the rights, liens, and equities *of each and all of the creditors* of the said Louisville, New Albany & Chicago Railway Company as the same may be finally ascertained and decreed by the court upon the respective claims and interventions of several of such creditors or lienors in and to not only the said line of railroad, appurtenances, and equipment or any part of them, but also to and upon each and every portion of the assets and property of the said

> insolvent corporation, and that said railroad and all the assets of such corporation shall be sold by proper decree of court, and the proceeds divided among the different creditors according as their liens and priorities may be decreed by the court."

It is true that some months afterward foreclosure suits were brought on three mortgages, and these suits were, on the application of the complainants, or with their consent, consolidated with that of the creditors' bill. But this consolidation did not take away the jurisdiction or duties of the court which arose under the original bill. On the contrary, its effect was only to make them parties to the original bill.

> "When consolidation is consented to by all the parties, they, in effect, agree that the separate actions shall be discontinued and a new and distinct action shall be created, in which shall be included and litigated all of the questions presented by the pleadings in the former actions." (Enc. of Pl. and Pr., Vol. IV, 701.)

The logical result of the consolidation, therefore, was to give to the creditors the same right to be heard on *all* the questions as they would have had in the original suit. In fact, the foreclosure bills which were filed did not make defendant the original judgment creditor, John T. Mills, jr., who was the complainant in the creditors' suit; and the only way in which he or any other creditor now is bound is by virtue of the consolidation and of the decree entered in the consolidated cause. The Court below is incorrect when it puts its decision upon the ground that the appellant did not file nor offer to file an answer in the court below. The appellant never was a defendant. On the contrary, if the order admitting him in the case had any effect, it was that he was party complainant in connection with the original judgment creditor. There appears absolutely no possible ground on which the appellants could proceed in filing or offering to file an answer. Their intervening petition was a pleading, and which sought to attack the judgment rendered, and, it is submitted, it was the only pleading which they could file in the cause. It will be observed that that pleading made the charge of conspiracy between the Company and its mortgagees to procure the judgment, for the purpose of reorganizing it in the interest of the stockholders and without the payment of the Company's liabilities; and it prayed that these mortgagees and the Company should be required to answer these allegations. But, by refusing to set aside the decree or postpone its execution, the Court practically denied the prayer.

In matter of fact, there is no allegation in the bills of complaint which could have been denied, even if the appellant had been made a party defendant. The court will see, from the errors assigned, that the defenses were not such as could have been made by answer. It is submitted, however, that the appellant is entitled in this case to intervene with or without a judgment.

III.

The result of the authorities may be thus stated:

First. A simple contract creditor has no right to proceed in equity to subject the property of his debtor, but must first exhaust his remedy at law. And in this respect there is no difference between an individual and a corporation.

> Graham v. R. R. Co., 102 U. S. 148;
> Hollins v. Brierfield Coal Co., 150 U. S. 371.

Second. In case of the death of an individual, however, a creditor, though without a judgment, may file a bill for discovery of assets and a distribution of the estate.

> Thompson v. Brown, 4 Johnson Chancery, 619;
> Hegan v. Walker, 14 Howard, 29;
> Kennedy v. Creswell, 101 U. S. 641;
> Johnson v. Waters, 111 U. S. 640–670;
> 1 Story's Equity, 546;
> Pullman v. Stebbins, 51 F. R. 10;

and in such a case an injunction will go against creditors suing at law.

Bispham's Equity, Sec. 530;
Rhodes v. Arnsinck, 58 Md. 345.

If the analogy between the corporation and individual proceeds further, then, to a corporation which comes into a state of civil death, the same rule must apply, and the authorities confirm this. The doctrine that the assets of a corporation constitute a trust fund to be distributed among its creditors, only becomes effective when that corporation ceases to exist as an active, going concern—which is practical death. Thus, in Graham v. R. R. Co., 102 U. S. 148, the court, by Mr. Justice Bradley, said:

> "When a corporation becomes insolvent, it is so far civilly dead that its property may be administered as a trust fund for the benefit of its stockholders and creditors. A court of equity, at the instance of the proper parties, will then make those funds trust funds, which, under other circumstances, are as much the absolute property of the corporation as any man's property is his."

Prior to the above decision, Mr. Chief Justice Waite had observed, in Terry v. Anderson, 95 U. S. 636:

> "Ordinarily a creditor must put his demand into judgment against his debtor and exhaust his remedies at law before he can proceed in equity to subject choses in action to its payment. To this rule, however, there are some exceptions; and we are not prepared to say that a creditor of a dissolved corporation may not, under certain circumstances, claim to be exempted from its operation."

And Mr. Justice Brewer said, in Hollins v. Brierfield Co., 150 U. S. 371, of the doctrine announced in Graham v. R. R. Co.:

> "It is rather a trust in the administration of the assets after possession by a court of equity than a trust attaching to the property, as such, for the direct benefit of either creditor or stockholder."

And Mr. Justice Harlan, in the very recent case of Sutton Mfg. Co. v. Hutchinson, 63 F. R. 496, rendered the opinion of the Circuit Court of Appeals for the Seventh Circuit, and reviewing the authorities, decided that when a private corporation becomes insolvent and ceases to perform the functions for which it was created, it becomes civilly dead, and that moment there is created a trust in all officers and persons holding its assets, for the benefit of its creditors.

So that, whatever may be the rule, the authorities are all agreed that when a court seizes the assets of a corporation for the purpose of administering the trust and distributing the assets among its creditors, it invests these assets with a trust, in which any creditor, with or without judgment, is entitled to share.

Case v. Beauregard, 98 U. S. 119, 101 U. S. 688;
Belmont Nail Co. v. Col. Iron Co., 46 Fed. R. 337;
Continental Trust Co. v. Toledo R. Co., 82 Fed. R. 642.

Third. The rule which requires a creditor to have judgment before proceeding in equity, seems not to be entirely clear. Apparently the rule rests upon two principles: One is, that the liability of the defendant shall be ascertained and the amount of the debt be determined at law, and in those cases, if the debt be admitted, then no judgment at law is necessary. (Johnson v. Waters, 111 U. S. 640–670; Tompkins v. Catawba Mills, 82 Fed. R. 780.)

But there are cases which also hold that not only must the creditor have judgment, but he must have exhausted his remedies at law by suing out execution, and must have a return of "no property found" before he will be allowed to proceed in equity. But, as in the other case, the law never requires a useless thing; and so, if a court of equity has already taken all of the assets of a corporation into its grasp for the purpose of distributing them among its creditors, it surely could not require every creditor to obtain a judgment, sue out execution, and have a return of "no property." In fact, a court of equity would enjoin the useless and futile prosecution of such suits at law. "All creditors are in a sense deemed to be before the court," and will be bound by the decree. (Story's Eq. Pl., Sec. 99.)

Fourth. Strangely enough, the court below held that the Louisville Trust Company was not a judgment creditor. The bill of complaint under which the Circuit Court seized the property of the corporation was based on the fact that the appellant and others had judgments establishing the validity of their claims against the defendant Company. The bill states that the United States Circuit Court of Appeals for the Sixth Circuit had decided that "The defendant corporation is liable on such guaranty to all persons who obtained such bonds for value and without notice that the majority of its stockholders had not petitioned for or authorized the guaranty," and that such court of appeals further held and decided that "upon the evidence, all of the bonds covered by the decree, except a small number, were acquired in good faith and without such notice, and that the defendant corporation was therefore liable upon such guaranty."

The petition of the Louisville Trust Company to be made a party in the cause sets forth that it was one of the parties in whose favor the Circuit Court of Appeals had so decided. That judgment is in full force and has not been suspended or superseded. It is true that this Court has awarded a writ of certiorari to the Circuit Court of Appeals, and that the cause is now pending in this Court, but the judgment below is still in full force.

The fact is, the jurisdiction and action of the court below were based on the fact that the appellant had such a judgment. And yet the court decided that the appellant had no standing in court because it had no judgment. If the object of the judgment is to ascertain and fix the liability, then the plaintiff is a judgment creditor. If, ordinarily, in addition to such judgment, he must have sued out execution in order to have a standing in a court of equity, the rule can not apply in this case where the court has seized every asset which was subject to execution.

In this case, moreover, the court below, without objection, granted the request of the petition of intervention and allowed the appellant to be made a party to the proceeding in its own behalf. There can be no doubt of the power of the Court in such cases, and the consequent right of the appellant to appeal from any errors in the proceedings affecting his interest.

Sage v. Central R. R., 93 U. S. 412–419;
French v. Gapen, 105 U. S. 509–525.

A decree which barred the equity of redemption, affected the rights of every creditor in whose behalf the Court had seized the property. In fact, the filing of the bill created an equitable levy for the benefit of all persons who were entitled to distribution out of the value of that equity.

IV.

THE DECREE OF FORECLOSURE WAS ERRONEOUS BECAUSE IT WAS FOR MORE THAN WAS ENFORCIBLE ON THE MORTGAGES AT THE TIME IT WAS RENDERED.

The Court below decreed that the defendant company should within ten days pay the past due interest on the three mortgages foreclosed, aggregating the sum of $232,477.12, and that, unless the said payment should be made within the time directed, the equity of redemption should be foreclosed and forever barred, and that the property should be sold for the purpose of paying the amount so decreed.

It is evident that if this decree required the payment of more than was then enforcible, it was erroneous.

Chicago R. R. Co. v. Fosdick, 106 U. S. 47.

This was assigned for error on appeal, but met with no consideration by the court. Indeed, in the opinion of the Appellate Court, it is said:

> "The *sole* ground of objection to the complainant's case in the court below, as set forth in the petition of appellant, and which was filed after a decree was taken, and which was addressed to the discretion of the Court asking to have the decree set aside, was the total invalidity of the various bonds and mortgages," etc.

This statement seems to be incorrect, for, in fact, not only was the amount of the decree assigned for error, but it was the point most elaborately argued and relied on in the Circuit Court of Appeals, and, as it did not receive consideration there, the appellants now ask it from the Supreme Court. One of the mortgages so foreclosed was given to the Farmers Loan and Trust Company and John H. Barker, trustees, and it was then, and it is now, contended that under that mortgage there was no right in behalf of the trustees to institute proceedings of foreclosure. Their powers and rights are all derived from the deed of trust, which is found in Record, page 69. The provisions of that deed which apply to the question are as follows:

The second provision (R. p. 74) provides:

> "Until default shall be made in payment of the principal or interest secured by said bonds, or some of them, the railroad company shall be permitted to possess, manage, operate, and enjoy, all and singular, the mortgaged premises, with their appurtenances, and to take and use the rents, incomes, profits, and issues thereof in the same manner and to the same effect as if this indenture had not been made."

The third clause is as follows:

> "In case default in the payment of interest on any of the bonds secured by this indenture shall be made and *shall continue for the space of six months*, and such payment shall be duly demanded, then the trustees may, and if requested in writing by the holders of the majority of the bonds secured thereby and then outstanding, shall enter upon all and singular the mortgaged premises and every part thereof, and possess, operate, use, and enjoy the same; and upon demand in writing being made by the trustees, the railway company shall immediately surrender possession of all and singular

> the mortgaged premises and property of every sort and description, to the trustees. It shall also be lawful for the trustees, in case *such default shall be made and continue as aforesaid*, and payment be demanded, and in case such request of bondholders be made, as aforesaid, they shall do so, to sell and dispose of all the premises and property of every sort and description."

Then follow provisions as to manner of sale and disposition of proceeds. The fourth clause provides that

> "In case default in the payment of interest on any of the bonds secured by this indenture shall be made *and shall continue for the space of six months*, and such payment shall be duly demanded, then the trustees, if they shall elect so to do, may, and if requested in writing by the holders of one half of the bonds secured thereby and then outstanding, shall apply to any court or courts having proper jurisdiction in the premises for a foreclosure of this deed of trust or mortgage, and sale of the mortgaged premises and property, and for the appointment in the meantime of a receiver of the mortgaged premises under this indenture, the trustees to have the right to nominate and designate the person to be appointed receiver, and so far as lawfully may be done, to control and direct the general course of the administration of the mortgaged premises by and on the part of such receiver. *In the event of such right of foreclosure and sale accruing, for non-payment of interest*, immediately thereupon the whole amount of the principal of the bonds secured by this indenture and then outstanding shall, at the option of the trustees, become due and payable, and this provision is expressly declared not to be in the nature of penalty for breach of condition or for the non-payment of interest, but to be a provision which is essentially necessary to carry out the objects and purposes of the parties hereto." (R. pp. 75 and 76.)

Whether or not the other mortgages foreclosed conferred any right upon the trustees to institute proceedings immediately upon default, need not be discussed. The decree on one mortgage, before the trustees were entitled to institute proceedings for foreclosure, makes the decree erroneous. In other words, if the decree *nisi* was for more than sufficient to pay the amount then due and enforcible, it was error, for if the decree had been for the correct amount, then those entitled to redeem might have been able to relieve the forfeiture. Thus, in Chicago R. R. Co. v. Fosdick, 106 U. S. 47–71:

> "It is obvious that the finding of the amount due, for non-payment of which, according to the terms of the decree, the mortgaged property is ordered to be sold, is the foundation of the right of the mortgagee further to proceed, and a substantial error in that finding must, on appeal, vitiate all subsequent proceedings. Unlike a calculable error in the amount of a personal judgment which may be cured by a *remittitur*, it is otherwise incurable; for as it is an illegal exaction, made as a condition for preserving the rights of the mortgagor in his estate, and, if executed, depriving him wrongfully of them, it propagates itself through all subsequent stages of the cause. The right to redeem is a favorite equity, and will not be taken away except upon a strict compliance with the steps necessary to divest it. Bigler v. Waller, 14 Wall. 297; Shillaber v. Robinson, 97 U. S. 68 . . . and the error is as vital where a larger amount than is actually due is ordered to be paid, as where there is a failure to find what amount is due."

The right of the mortgagor in deeds of trust "to stipulate for a breathing spell for the payment of his matured debts" is clear, and the sole question is whether such a stipulation has been made.

Farmers L. & T. Co. v. Chicago R. R. Co., 61 Fed. 546.

In deeds where provisions similar to those in clauses 2 and 3 provide for the exercise by the trustee of the right of possession and sale *without judicial action,* and which limit the exercise of this right, such provisions do not prevent the institution of proceedings in court before the limitation has expired.

Morgan's La. R. R. Co. v. Texas R. R., 137 U. S. 171.

But, on the contrary, if there is a provision in the mortgage which limits the right to institute a suit to foreclose, then that limitation will govern the exercise of the right.

Chicago R. R. Co. v. Fosdick, 106 U. S. 47.

This distinction was drawn and made clear in the case in 137 U. S. 171, *supra.*

It will be observed that in the fourth clause of the Farmers Loan and Trust Company mortgage, the right of the trustee to foreclose is expressly limited. It is provided that " if the default shall continue for the space of six months, *then the trustees may,* and, if requested by the holders of one-half of the bonds, *shall* apply to the Court for a foreclosure." This clause would be unmeaning unless it were given this effect, for, as it says that in that event *they may* institute proceedings, it would be absurd to say that they *might* do it before; and such was the decision in the Fosdick case.

The meaning is, however, put beyond doubt by the following sentence in the same clause: " *In the event of such right of foreclosure* and sale accruing from non-payment of interest, *immediately thereupon* the whole amount of the principal of the bonds secured by this indenture and then outstanding shall, at the option of the Trustees, become due and payable." In other words, the option to declare the principal due arose at the same time of the right to foreclose, and it would be unusual and extraordinary to interpret that to mean the day of the default. It was evident that the right to institute proceedings to foreclose was intended to be postponed until the expiration of six months. In this case the proceedings were begun and the decree entered and the sale made and confirmed, all before the six months had elapsed. The " breathing spell " contracted for was not allowed; in fact, in the rapid progress of this extraordinary foreclosure, *there was no breathing spell anywhere.*

V.

THE COURT ERRED IN CONFIRMING THE SALE WITHOUT NOTICE AND WITHOUT TIME TO FILE EXCEPTIONS THERETO.

In the statement of the case by the court below it is said:

> "The appeal is taken from the decree of foreclosure and sale, and from the order denying the application to set the same aside."

This is incorrect. The petition for the appeal (R. p. 203) complains of errors in the orders and decrees designated and set forth in an Assignment of Errors, and an appeal is prayed against the purchasers. The tenth assignment of errors is as follows:

> "The court erred in confirming the sale herein, and in not giving time in which to file exceptions to the same."

So that the appeal in this case was also from the order confirming the sale. The error consists in not laying over the report, so as to give the parties opportunity to except to it. The report of sale was filed on the 10th of March, 1897, and was confirmed on the same day by the consent of the mortgagees, the Railroad Company, and the original creditor, John T. Mills. The Louisville Trust Company was not present, had no notice, and no opportunity was given it to except to the sale. And this was done, though on the day before it had filed its petition contesting the correctness of the judgment and praying that the decree of sale be set aside, or that the sale be postponed.

It has been often held that an order of confirmation of sale is a final decree, and an appeal would lie by any person who had interest in the matter.

Blossom v. R. R. Co., 1 Wall. 65;
Butterfield v. Usher, 91 U. S. 246; and in

Sage v. R. R. Co., 96 U. S. 712, the Court said:

> "We have often decided that a decree confirming a sale, if it is final, may be appealed from. In this case it is final, so far as the title under the sale is concerned. It cuts off the equity of redemption by the railroad company and the junior mortgagees and *general creditors*, except as provided in the decree of October 22d, and passes the title to the purchaser subject to certain trusts already fixed by the Court, over which the present appellants have control only through their appeal from the former decree. No reversal of any order hereafter made will necessarily divest this title. The proceedings hereafter will relate only to the disposition of the property acquired by the purchase and the proceeds of the sale. For relief against the sale, resort can alone be had to an appeal from the decree of confirmation."

The practice in England, and which has been approved in this country, is that a decree for the confirmation of a sale must give time for filing exceptions thereto, and this has been approved and is the practice adopted by the United States Courts of Equity.

Pewabic Mining Co. v. Mason, 145 U. S. 349–364;
Mayhu v. West Virginia Oil Co., 24 F. R. 205;
Central Trust Co. v. Sheffield Co., 60 F. R. 9.

VI.

THE MORTGAGES FORECLOSED WERE VOID AS TO PROPERTY WITHIN THE STATE OF ILLINOIS.

The Circuit Court, in its decree, adjudged that the mortgages were a valid lien upon the property of the Company in the State of Illinois. The mortgages purport to cover a leasehold of a railroad and of terminals in that State, but does not state the terms of the lease. It is submitted that it makes no difference whether it be a leasehold or a freehold. It is property situated within the State of Illinois. No authority need be cited for the doctrine that in such case the validity of the mortgage must depend upon the local law. The rule is absolute. And in such cases it was well said by Mr. Justice Brewer, in Detroit v. Osborne, 135 U. S. 498:

> "Even if it were a fact that the universal voice of the other authorities was against the doctrine announced by the Supreme Court of Michigan, the fact remains that the decision of that Court, undisturbed by legislative action, is the law of that State."

The title of the Louisville, New Albany & Chicago Railway Company to the property in Illinois was derived as follows:

The Chicago & Dyer Railroad Company, a corporation of Illinois, was chartered to construct a railroad from Chicago to the Indiana State line. The Chicago & Indianapolis Air Line Railroad Company was an Indiana corporation, chartered to construct a railroad from Indianapolis to the State line. These two corporations were consolidated, or attempted to be consolidated, *in* 1881, under the name of the Chicago & Indianapolis Air Line Railroad Company. Afterwards this company was incorporated with the Louisville, New Albany & Chicago Railway Company, another corporation of Indiana. At the time of the consolidation of the Chicago & Dyer Railroad Company and the Chicago & Indianapolis Air Line Railroad Company, there was no law in the State of Illinois which authorized a consolidation of a railroad company in that State with a railroad company in another State, and no such law was passed until 1883. The effect of an attempt at such consolidation came before the Supreme Court of Illinois in the case of the American Loan & Trust Company v. Minnesota Co., 157 Ill. 741; 47 N. E. Rep. 153. That court decided that such an attempted consolidation was absolutely void, and that a mortgage executed by such a pretended consolidated company upon property in Illinois was void and of no effect, and that it could not be valid as having been made by a corporation *de facto*, because there could be no such corporation *de jure;* and that the rule was established that where there *could* be no corporation *de jure* there *should* be none *de facto.* That this is the law of the State of Illinois, can not be successfully denied.

The Circuit Court of Appeals, however, refers to the very recent case of the Continental Trust Co. v. The Toledo Co., 82

F. R. 642, as having decided in opposition to the appellant's contention. It is submitted that that case is not only not inconsistent, but confirms the position. The consolidation in that case took place after the act of 1883, and because there could then have been such a corporation *de jure*, the court held that it was one *de facto*. But the contention in this case is not like the one in that case. The assignment of error here was that the court erred in deciding that the mortgages were valid upon the property *situated within the State of Illinois*. The appellants did not contend that the Indiana corporation had lost its existence, or that the mortgages were not valid upon the property within the State of Indiana. It was insisted only that, by the law of the State of Illinois, the consolidation was invalid, and that the mortgages were void upon property within that State. And if the deliberate decision of the highest court of that State is to be followed in determining such a question, then the mortgages were and are void as to such property.

The statement in the opinion of the Circuit Court of Appeals, that the appellant occupies the anomalous attitude of denying the capacity of the defendant corporation to issue its own bonds to secure its own indebtedness and to enable it to carry on its own business, is not a correct statement of the appellant's attitude. The court misconceived the position taken by the appellant, and therefore did not pass upon the real question at issue.

VII.

For the manifest errors before given, and for others which will appear from the perusal of the record, the appellant hopes for a consideration by this court. Where the errors complained of are merely technical, the appellants, who are now your petitioners, hope to show that in the proceedings below there was a disregard of those rules of equity and of practice in equity which would convince the court that errors had been committed. But the fundamental and substantial complaint is, that the whole proceedings in the Court below was the result of a combination between the mortgagees and the officers and stockholders of the defendant Company to wreck the Railroad Company and reorganize it in the interests of the stockholders, for the purpose of excluding the unsecured creditors. A careful consideration of the record will convince the Court that the purpose and object of the proceedings had but one thing in view, and that was, to avoid the obligations to the petitioner and others, and preserve the interests of the stockholders without the payment of their debts. As this Court has directed to be certified to it the case in which their right to be creditors is involved, it surely is not asking too much that they shall also certify, for their consideration, *these* proceedings, upon which their rights as creditors to enforce their claims must depend. If, during the pendency of the case before this Court, the debtor can thus securely deprive them of any hope to enforce their claims, the machinery of the courts of equity has been used in the furtherance of wrong. That the whole matter may be thus brought before this Court, and that justice be done, the petitioner has prayed for the writ of certiorari.

VIII.

Finally, the petitioner complains that, while the Court decided that the petitioner had no standing in Court, yet it has decided the case upon the merits. Instead of dismissing the bill without prejudice, it has rendered a decree which will forever estop the petitioner from attacking what it claims to be a fraudulent decree. Surely this can not be right.

Respectfully submitted.

St. John Boyle,
Swagar Sherley,
Counsel for Petitioner.

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JAMES H. McKE

No. 263 263

Bry by Boyle & Sherley for Ap

SUPREME COURT OF THE UNITED STATES

Filed Apr. 6, 1899.

LOUISVILLE TRUST COMPANY, - *Appellant,*

versus

LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY COMPANY, &c., - *Appellees.*

BRIEF FOR APPELLANT.

ST. JOHN BOYLE,
SWAGAR SHERLEY,
Counsel.

[illegible]

SUPREME COURT OF THE UNITED STATES.

Louisville Trust Company, - - - *Appellant,*
versus
Louisville, New Albany & Chicago Railway
Co., &c., - - - - - - - - *Appellees.*

This case affords a striking illustration of a railroad foreclosure and reorganization. It furnishes an example, probably without its equal, of the wreck of a railroad corporation, and of its renewal and regeneration under the protecting influence of a court of the United States. It also shows how the great powers of a court of equity may be unwittingly used to assist in the consummation of a fraud, which that court was created to prevent.

A seemingly prosperous railroad company, against which there were, on August 22, 1896, no judgments on which execution could issue; which had never defaulted in the payment of interest on its mortgage bonds, and with no installment of interest falling due for more than two months, was placed by the Circuit Court of the United States in the hands of its Vice-President and General Manager as its Receiver. And within less than seven months thereafter, it had defaulted on three issues of bonds, and had been sold under a decree of foreclosure for a failure to pay $228,775.00 of unpaid coupons, with nearly $15,000,000.00 of bonds outstanding; and the sale had been confirmed, and the road ordered to be conveyed to the purchaser. This purchaser was the new company, composed of the bondholders and stockholders of the old. No change had occurred during this proceeding to attract attention to its progress, and after it was over, the same old officers, representing the same old stockholders, continued to pursue the same old course. A new name was painted on the same old cars, and the ticker in Wall Street thereafter quoted "CIL" instead of "LNA." The old stockholders, with the assistance of the bondholders, had thus established themselves, as they think, successfully in the ownership of their old property without having paid their debts. The case, as it appears from the record, is as follows:

STATEMENT OF CASE.

I.

In a suit brought by the Louisville, New Albany & Chicago Railway Company against the Louisville Trust Company and others, for the purpose of obtaining a cancellation of an endorsement of guarantee made by the complainant upon the bonds of a Kentucky railroad, the Circuit Court of Appeals for the Sixth Circuit had decided that the complainant was not entitled to relief as to $250,000 of bonds represented before the Court, and which were owned by *bona fide* holders for value without notice, and that as to these bonds the complainant was bound on its guaranty. The decision is reported in Louisville Trust Company v. L., N. A. & C. R. R., 75 Fed. R. 433. The record in this case was ordered by the Supreme Court to be certified to it, and it has been argued and is still here pending and undetermined.

Thereafter, on the 24th of August, 1896, the appellee, John T. Mills, jr., brought a suit in the Circuit Court of the United States for the District of Indiana, and on the same day a judgment by confession was awarded for the sum of $494,911.25; and on the same day an execution was issued upon the judgment, and was duly returned by the marshal "No property found." And on the same day Mills filed his Creditors' Bill, setting up the judgment, execution, and return, and in behalf of himself and other creditors alleged that the defendant, the Louisville, New Albany & Chicago Railway Company, had unlawfully guaranteed the payment of $1,185,000 of the bonds of the Richmond, Nicholasville, Irvine & Beattyville Railroad Company, a corporation of the State of Kentucky, and that the Circuit Court of Appeals for the Sixth Circuit had decided that the corporation was liable upon such guaranty to such holders of the bonds as had acquired them in good faith and without notice; and that, by reason of such decision, the property of the defendant company was liable to be seized by process of law, for the purpose of satisfying such obligation.

The allegation of insolvency, and the purpose of the suit, and the prayer for relief are as follows:

> "10. Complainant further shows that the defendant has no property except its railroad, equipment, and appurtenances, and the corporate stock heretofore specified, and that all such property is described in and covered by one or more of the five mortgages hereinbefore set out, and that it has no resources to pay its unsecured debt except such surplus income from its road operations as may remain after discharging the interest upon mortgage bonds.
>
> "The corporate officers report that the current earnings of the road, in consequence of a short wheat crop and lessened traffic, are about $60,000 a month less than for the corresponding period of last year, and that such decline in earnings is likely to continue for some months, and that it will be impracticable to realize from such earnings after payment of operating expenses, taxes, and rentals a sum sufficient to pay the next shortly maturing coupons upon the $3,800,000 general and equipment mortgage bonds, and that both such liens will be defaulted upon at the next interest day.

"The decision rendered within the last month holding the defendant liable for over a million dollars by reason of such bond guarantee, has, in this period of exceptional shrinkage in traffic, absolutely destroyed the credit of the defendant corporation so that it can not either pay or renew its bank obligations or fund the same, and the said corporation is in fact insolvent.

"11. Complainant charges that the owned and operated lines of railroad of the said defendant corporation lie in three different States, and are subject to the jurisdiction of the courts in each of the counties in the said three States in which any part of the property is situated; that it owns a large amount of rolling stock, materials, and supplies necessary for the operation of the line, and that the unity of the property and its integrity as a whole, as now held and operated as a railway line connecting important cities in the three different States and engaged in domestic and interstate commerce, constitutes an important element of its value, and that to permit its severance or the continuous disturbance of its operations will result in ruinous sacrifice to every creditor of said corporation, and disable it from performing its duties as a public carrier. That the complainant verily believes that unless this court, in view of the present condition of the affairs of said insolvent corporation and the divers threatened litigations, attachments, and seizures, and the impending and inevitable default soon to occur on the two mortgage liens aforesaid, will deal with the property as a single trust fund and take it into its judicial custody for the protection of every interest therein, that divers individual creditors of the defendant will proceed to assert their remedies in the different courts in the several States where the property is situated; that levys and attachments will be laid upon the engines and cars of the company, and the fuel, material, and supplies which are indispensable to the continuous operation of the railroad will be seized, which will greatly interfere with and ultimately prevent the company from a proper discharge of its duties as a carrier and seriously diminish the earnings of the road; that considerable and unnecessary multiplicity of suits will result; that judgments and priorities will be attempted and the trust property, valuable mainly in consequence of its unity, will be dismembered by the conflicting decrees and judgments of the many courts exercising such separate jurisdictions at the suit of individual creditors.

"Inasmuch, therefore, as the complainant has no adequate remedy at law for the grievances hereinbefore stated, and can only have relief in equity, he files this bill of complaint in behalf of himself and all others in like relation to the said property, and prays that due process of law issue against the defendant, the Louisville, New Albany & Chicago Railway Company, and that it be summoned to appear in this court and answer this bill, but without oath, all answers under oath being hereby expressly waived under the rules to stand to and abide by such orders and decrees as the judges of this court may from time to time enter in the premises; that for the purpose of enforcing the rights of complainant and all other creditors of said insolvent corporation according to their due equities and priorities, and to preserve the unity of the said railway system as it has been and now is maintained and operated, and to prevent the disruption thereof by the separate attachments or levies, this court will forthwith appoint a receiver for the entire railroad property, choses in action, and assets of every description, wherever situated, belonging to the said defendant corporation, with authority to manage and operate the same as the officer of and under the protection of this court, with the usual powers of a receiver in such cases, and that all of the officers, managers, superintendents, and employes of the said railway company shall be ordered and required forthwith to deliver up possession of all and singular every part of the said property of said insolvent corporation over which the said receiver is thus appointed, and shall also deliver over all books of account, offices, vouchers, and papers in any way relating to the present business or operation of said system of railway, and shall be restrained from interfering in any way whatever with the possession and control of the receiver over any part of said property so to be delivered to him. That the court will fully administer the trust fund in which the complainant is interested as a judgment creditor, and will for such purpose marshall all the assets of said insolvent corporation and ascertain the several liens and priorities existing upon the said system of railways or any part thereof, and the amount due upon each and every of such liens, whether by mortgage or otherwise, and enforce and decree the rights, liens, and equities of each and all of the creditors of the said Louisville, New Albany & Chicago Railway Company as the same may be finally ascertained and decreed by the court upon the respective claims and interventions of several of such creditors or lienors in and to not only the

> said line of railroad, appurtenances, and equipment, or any part of them, but also to and upon each and every portion of the assets and property of the said insolvent corporation, and that said railroad and all the assets of such corporation shall be sold by proper decree of the court, and the proceeds divided among the different creditors according as their liens and priorities may be decreed by the court, and for such other and further relief as to the court may seem proper and as may be necessary to further enforce the rights and equities of the complainant and all other creditors of such corporation."

II.

The only defendant to the bill of complaint was the Louisville, New Albany & Chicago Railway Company. This company, having theretofore on the same day promptly confessed judgment in favor of the complainant for $494,000, with equal promptness filed its answer to the bill of complaint, admitting all the material allegations thereof; and, interposing no objection, the Court thereupon appointed the company's Vice-President and General Manager as Receiver of the property. In the order of appointment no provision was made for the Receiver's filing any report of his earnings and expenses, and none was filed. He was required to file only monthly reports of his receipts and disbursements, and, as these reports contain no information of any value and have no relation whatever to earnings and expenses, they were not copied into the Record. It does not appear, therefore, in this case what were the earnings and expenses received or incurred in the operation by the Receiver; and the court below, in administering the property, and the parties to the cause, never knew or had an opportunity to know the results of the operations.

III.

The seizure by the court of all the assets of the defendant corporation, and also of its current net income, necessarily forced the corporation to make default in the installment of interest which became due October 1st, and which amounted to the sum of $141,000—this being the semi-annual interest on an issue of $4,700,000 of bonds. On November 1st the corporation again made default on an issue of $2,800,000 of bonds, which interest amounted to the sum of $70,000; and on December 1st it made like default upon an issue of $709,000 of bonds, which interest amounted to $17,725. Bills were filed by the trustees in the different mortgages thus defaulted to foreclose the same, and the entire interest in default aggregated the sum of $228,725.

IV.

During the progress of the proceedings below it did not appear what were the net earnings derived by the Receiver, and therefore it does not appear whether or not these defaults were necessary. By the seizure of the property the Court below had constituted itself trustee for the administration of the property, and it would seem that a proper course of procedure would have demanded an investigation of the necessity of such default and of a consequent foreclosure. On the contrary, however, the court below from time to time made orders for the disbursement of moneys, which could better have been used for the purpose of preventing a foreclosure of the mortgages. Thus, on September 23d the Receiver was directed to pay to certain quarry owners the sum of $18,000 out of the earnings of the road, on account of their construction of certain railroad switches, and which they had agreed to receive payment for by way of rebates of freight upon their shipments. It seems, however, that the Court chose to anticipate such rebates, and to pay the amount at once. And again, on November 24th, the Receiver was authorized to borrow $200,000 for the purpose of changing the alignment of track and the removal of certain curves therein, for completing the ballasting of a certain division, etc. This borrowed money was to be paid entirely out of earnings, and was not to be a charge upon the property ahead of the bonds. It could, therefore, and should have been used to relieve the property of the necessity of a foreclosure. This single amount so borrowed, with two days' earnings, would have paid every dollar for which the Company was in default.

Instead of doing this, however, the Court rather chose to almost double the amount which it would be necessary to pay in order to prevent a foreclosure, so that, when the decree was entered, instead of being subject to redemption by the payment of $228,725, it had been charged by the Court with the additional sum of $200,000. The original suit on the creditors' bill, and the several suits of foreclosure instituted upon the mortgages in default, were consolidated and ordered to proceed under the title of The Farmers Loan & Trust Company of New York and John H. Barker, Trustees, v. The Louisville, New Albany & Chicago Railway Company and others. (Record, page 97.) No step had then been or was ever afterward taken in the cause to bring the creditors of the corporation before the court. No step was ever taken by the complainant in the creditors' bill to ascertain or to secure for the creditors any assets of the corporation, and the consolidated cause proceeded to a decree, and the creditors' right to redeem was barred and foreclosed without any notice and without any effort in any way to bring them before the court, except so far as they were represented by the original complainant. There was never any reference to a master to take proof of claims or to report upon assets and upon the liens thereon, and no testimony was ever taken in the cause.

V.

On January 23, 1897, however, the Louisville Trust Company and the Kentucky National Bank filed intervening petitions. These petitions simply alleged that they were the several holders of bonds of the Richmond, Nicholasville, Irvine & Beattyville Railroad Company, and payment of which had been guaranteed by the defendant, the Louisville, New Albany & Chicago Railway Company, and which guarantee had been adjudged and held to be valid by a judgment of the Circuit Court of Appeals for the Sixth Circuit, and praying for leave to intervene in the said cause in their own behalf. Whereupon it was by said court "Ordered, that the said Louisville Trust Company and the said Kentucky National Bank be and they are hereby admitted to appear in the proceedings in this case, each in its own behalf." On that day (January 23, 1897) the court entered the decree of sale.

VI.

As soon thereafter as was practicable, *i. e.*, on February 27, 1897, the Louisville Trust Company filed its intervening petition in the said cause (Rec. p. 189). This petition sets up in detail the issue of bonds by the Richmond, Nicholasville, Irvine & Beattyville Railroad Company, the guarantee thereof by the Louisville, New Albany & Chicago Railway Company, the purchase of the bonds by the Louisville Trust Company, and the adjudication of their validity by the United States Circuit Court of Appeals for the Sixth Circuit. The substantial grounds on which the said petition was filed are as follows:

> "And the petitioner further says that afterwards John T. Mills, jr., instituted a suit against the said New Albany Company in the United States Circuit Court for the District

of Indiana on August 24, 1896, and the said company appeared thereto and confessed judgment; and on the same day a writ of *fieri facias* was issued thereon, and on the same day was returned wholly unsatisfied; and thereupon on the same day, the said John T. Mills, jr., filed his bill of complaint herein and moved for the appointment of a receiver to take charge of all the assets and properties of the said defendant company, and to which the said company appeared and confessed the allegations of the bill of complaint; and thereupon W. H. McDoel was appointed receiver, who had theretofore been the General Manager of the said Company. And the petitioner charges that the said John T. Mills, jr., claimed to be a creditor to the amount of $494,911.35, but did not disclose or discover to the court in his proceedings that he was not a general creditor, but he was at the time, if a creditor at all, secured with collateral securities, the value of which is unknown to your petitioner. And the petitioner charges that the proceedings in behalf of the said John T. Mills, jr., were procured by the said New Albany Company for the purpose of hindering and delaying the general or unsecured creditors of the said company in the enforcement of their debts; and that since the entry of the said order of appointment no step has been taken in the said cause, either to ascertain or to bring into court the assets which are subject to the payment of the said debts, and no proceeding has been taken to notify or to bring before the court the said general or unsecured creditors; that afterwards, on November 12, 1896, the Farmers Loan and Trust Company filed its bill against the said New Albany Company to foreclose the mortgage executed to the complainant as trustee, dated January 1, 1886, to secure an issue of ten millions of dollars of bonds; and also on the same day the Central Trust Company filed its bill of complaint to foreclose a mortgage executed by the said New Albany Company to the Central Trust Company and John H. Stotsenberg, trustees, on May 1, 1890. And on the same day, November 12, 1896, an order was entered herein consolidating the said causes and extending the receivership under such bills; and thereafter, on the 23d day of January, 1897, a decree was entered herein foreclosing the said mortgage and ordering a sale of the mortgaged properties, and all of which was done *before there was a right to have such decree entered*, and without bringing before the court the general or unsecured creditors so that they might be heard in their own behalf.

> "*And the petitioner further says that prior to the entry of the said decree the holders of the bonds secured by the mortgages to the Farmers Loan and Trust Company and the Central Trust Company aforesaid, and the holders of the preferred and common stock of the said Louisville, New Albany & Chicago Railway Company, or a part thereof, had entered into an arrangement or agreement for the purpose of procuring the sale of the said property, its purchase by and in behalf of the parties entering into such combination, and a reorganization thereof, and the issue of securities to the said parties, including said stockholders, without the payment of the debts and liabilities of the said company, and for the purpose of hindering and delaying the said creditors,* and with a view to prevent the collection or enforcement of such debts and liabilities; and that the said decree of sale was obtained by the said company and said complainants in order to carry out such unlawful purpose and to prevent the general or unsecured creditors of the said company from having an opportunity to be heard in matters arising in the said cause."

The petition then averred that the mortgages sought to be foreclosed and on which a decree had been entered, were void as to the property in the State of Illinois, under the decision in the case of American Loan & Trust Co. v. Minnesota Co., 167 Ill. 641.

The petition further set forth that, by the terms of the mortgages foreclosed, there was no right to institute proceedings for foreclosure until a period of six months had elapsed, and that the decree was, therefore, erroneous and unjust in enforcing a sale before the mortgagees were entitled to it.

On all of these grounds the petition prayed that the decree of sale be set aside; that the cause be referred to a commissioner to take proof of its debts, and to ascertain and report upon the net earnings, and the property embraced and not embraced by the mortgages; and in addition, prayed as follows (Record, p. 198):

> "Wherefore, the petitioner prays that an order be entered herein, commanding the plaintiff, John T. Mills, jr., the Farmers Loan and Trust Company of New York, the

> Central Trust Company of New York, and the Louisville, New Albany & Chicago Railway Company to appear within a time to be fixed in such order, and to plead or make answer to the allegations herein; and for all such other and further orders and judgments as to the court shall seem meet and proper."

And on the same day the Court entered the following order:

> "The petition of the Louisville Trust Company filed herein on the 27th day of February, 1897, came on to be heard this day and was argued by counsel, and upon consideration thereof the court refuses to vacate the decree of foreclosure and sale heretofore entered in this cause on the 23d day of January, 1897, and refuses to enter an order postponing or adjourning the sale."

VII.

The Court having thus refused to set aside the decree or to adjourn or postpone the sale, it took place on March 10th, and on the same day the report of the sale was confirmed and the deed ordered to be made to the purchaser. No notice was given, and no time allowed in which the report of sale could be excepted to. Having been admitted as a party to the proceeding by special order of Court, and having thus become subject to its orders and decrees—by which it would be bound—the reported sale, on the same day on which it was made, was confirmed by consent of other parties and without notice to the Louisville Trust Company or other creditors.

This was quite adroit, because counsel foresaw that, if an opportunity was allowed, the Louisville Trust Company would certainly file exceptions to the report of sale, and that such exceptions, based upon the same allegations as were contained in its intervening petition filed before the sale, would enable this creditor to adduce before the Court the evidence to support it. In other words, it was clear to them that the Louisville Trust

Company would undertake and would prove that the whole proceedings in this case had been conducted and the sale had been made and the property bought in, under a confederation between the bondholders and the stockholders, by which the property should be bought for their benefit, and that the stockholders would thus be enabled to continue their interest in the property without the payment of their obligations.

VIII.

Under these circumstances, the only resource left to the Louisville Trust Company was an appeal, and this appeal was prosecuted, and the decision of the Circuit Court of Appeals for the Seventh Circuit affirming the decree below is reported in: Louisville Trust Co. v. Lou., N. A. & C. R'y Co., 84 Fed. R. 539. That court held that the Louisville Trust Company, being an unsecured creditor, could not be made a defendant, and was neither a necessary nor proper party, and rather illogically said that unless the Louisville Trust Company had asked and obtained leave to put in an answer, it could not defeat the equities of the bill, declaring that it would be a travesty upon equity proceedings. Thereupon the Louisville Trust Company filed its petition before the Supreme Court, and in accordance with it a writ of *certiorari* was granted, and the record is now before this court.

ARGUMENT.

I.

"The Court erred in entering the decree of foreclosure and sale herein, because the said cause had not been prepared and was not ready for hearing, and the said hearing and decree was entered prematurely."

This was the first error assigned on the appeal. It was based on the fact that no step or proceeding of any kind had been taken under the creditors' bill to prepare it for a decree. No advertisement for creditors to prove their claims, no reference to a commissioner was made, and absolutely nothing done on which to render a decree under the original bill of complaint. When the suits for the foreclosure of the several mortgages were consolidated with the creditors' bill it became one suit, and it is submitted that no decree should have been entered until the main cause had been duly prepared. While it can not be asserted to be true, yet it is not improbable that if the creditors' suit had been prepared, it might not have been necessary ever to have rendered a decree of foreclosure. The effect of consolidation is as follows:

> "When consolidation is consented to by all the parties, they in effect agree that the separate actions shall be discontinued, and a new and distinct action shall be created, in which shall be included and litigated all of the questions presented by the pleadings in the former actions." (4 Enc. of Pleadings and Practice, 701.)

In the case of the Mercantile Trust Co. v. The M., K. & T. R. R., 41 Fed. R. 8, Mr. Justice Brewer refused to consolidate certain cases, and said:

> "But the cases are not ripe for a decree, and there is no certainty as to when either one will be. If one be delayed while another is speedy, it may be that consolidation never will be proper, for the mortgagee who is prompt ought not to suffer for the delay of one who is a laggard."

It was evidently the opinion of the learned Justice that the effect of consolidation was to postpone separate proceedings, and that a decree would not be entered until each part of the consolidated cause had been prepared. It is submitted that, until the creditors' suit had been prepared, the creditors brought before the court, and the extent of the assets and liens determined, it could not be known whether a foreclosure was necessary, nor could the creditors determine whether or not they would be able to redeem the property.

II.

The Circuit Court of Appeals erroneously decided that the appellant "Had no standing in the Court below; at best it was only a general creditor of the defendant company, having and claiming to have no interest or lien upon the real estate and franchises of the company which formed the subject of the foreclosure suits."

In support of this decision the Court cited authorities in support of the well known rule that general creditors are neither necessary nor proper parties in a suit for foreclosure. It would seem to be a complete answer to say that this was not a suit for foreclosure. The original bill of complaint, under which the Court seized all the property and assets of the insolvent Railway Company, was framed in behalf of all creditors, and for a winding up of the affairs of the corporation and the distribution of its assets to whomsoever might be found to be entitled. It was part of the prayer of the bill that the Court would fully administer the trust fund thus created, and distribute the entire assets among those who might be found to be creditors. But even if this were not so, the Bill of Complaint itself alleged the existence and validity of these obligations, and set forth in detail that the Circuit Court of Appeals for the Sixth Circuit had adjudged and decreed that they were valid and subsisting obligations, and that the defendant corporation was liable thereon; and that, because of this adjudication, it had become necessary to wind up the affairs of the corporation.

The Circuit Court of Appeals further based its decision on the ground that the appellant did not file or offer to file an answer in the court below. The appellant never was a defendant. On the contrary, if the order admitting him in the case be given any effect, it was that he was a party complainant in connection with the original judgment creditor. There appears absolutely no ground on which the appellants could proceed in filing or offering to file an answer. Their intervening petition was a pleading—one which was meant to attack the judgment rendered—and it is submitted that it was the only pleading which the creditor could file in the cause. It will be observed that that pleading made the charge of a conspiracy between the Company and its mortgagees to procure the foreclosure and sale for the purpose of reorganizing the property in the interest of the stockholders and without the payment of the Company's liabilities, and it prayed that the mortgagees in the Company should be required to answer the allegations. By refusing to set aside the decree or postpone its execution, the Court practically denied the prayer. The only other possible way for the creditor to have brought the matter before the Court was by exceptions to the sale, and the right to do this was denied by the immediate confirmation.

Upon the question of the standing of a creditor in court, the result of the authorities may be thus stated:

First. A simple contract creditor has no right to proceed in equity to subject the property of his debtor, but must first exhaust his remedy at law. And in this respect there is no difference between an individual and a corporation.

> Graham v. R. R. Co., 102 U. S. 148;
> Hollins v. Brierfield Coal Co., 150 U. S. 371.

Second. In case of the death of an individual, however, a creditor, though without a judgment, may file a bill for discovery of assets and a distribution of the estate.

> Thompson v. Brown, 4 Johnson Chancery, 619;
> Hegan v. Walker, 14 Howard, 29;
> Kennedy v. Cresswell, 101 U. S. 641:
> Johnson v. Waters, 111 U. S. 640–670;
> 1 Story's Equity, 546;
> Pullman v. Stebbins, 51 F. R. 10;

and in such a case an injunction will go against creditors suing at law.

> Bispham's Equity, Sec. 530;
> Rhodes v. Arnsinck, 58 Md. 345;
> Thompson on Corp., Sec. 6897.

If the analogy between the corporation and individual proceeds further, then, to a corporation which comes into a state of civil death, the same rule must apply, and the authorities confirm this. The doctrine that the assets of a corporation constitute a trust fund to be distributed among its creditors, only becomes effective when that corporation ceases to exist as an active, going concern—which is practical death. Thus in Graham v. R. R. Co., 102 U. S. 148, the court, by Mr. Justice Bradley, said:

> "When a corporation becomes insolvent, it is so far civilly dead that its property may be administered as a trust fund for the benefit of its stockholders and creditors. A

> court of equity, at the instance of the proper parties, will then make those funds trust funds, which, under other circumstances, are as much the absolute property of the corporation as any man's property is his."

Prior to the above decision, Mr. Chief Justice Waite had observed, in Terry v. Anderson, 95 U. S. 636:

> "Ordinarily a creditor must put his demand into judgment against his debtor and exhaust his remedies at law before he can proceed in equity to subject choses in action to its payment. To this rule, however, there are some exceptions; and we are not prepared to say that a creditor of a dissolved corporation may not, under certain circumstances, claim to be exempted from its operation."

And Mr. Justice Brewer said in Hollins v. Brierfield Co., 150 U. S. 371, of the doctrine announced in Graham v. R. R. Co.:

> "It is rather a trust in the administration of the assets after possession by a court of equity than a trust attaching to the property, as such, for the direct benefit of either creditor or stockholder."

And Mr. Justice Harlan, in the very recent case of Sutton Mfg. Co. v. Hutchinson, 63 F. R. 496, rendered the opinion of the Circuit Court of Appeals for the Seventh Circuit, and reviewing the authorities, decided that when a private corporation becomes insolvent and ceases to perform the functions for which it was created, it becomes civilly dead, and that moment there is created a trust in all officers and persons holding its assets, for the benefit of its creditors.

So that, whatever may be the rule, the authorities are all agreed that when a court seizes the assets of a corporation for the purpose of administering the trust and distributing the assets among its creditors, it invests these assets with a trust, in which any creditor, with or without judgment, is entitled to share.

Case v. Beauregard, 98 U. S. 119, 101 U. S. 688;
Belmont Nail Co. v. Col. Iron Co., 46 Fed. R. 337;
Continental Trust Co. v. Toledo R. Co., 82 Fed. R. 642;
Thompson on Corp., Sec. 6897.

Third. The rule which requires a creditor to have judgment before proceeding in equity, seems not to be entirely clear. Apparently the rule rests upon two principles: One is, that the liability of the defendant shall be ascertained and the amount of the debt be determined at law, and in those cases, if the debt be admitted, then no judgment at law is necessary. (Johnson v. Waters, 111 U. S. 640–670; Tompkins v. Catawba Mills, 82 Fed. R. 780).

But there are cases which also hold that not only must the creditor have judgment, but he must have exhausted his remedies at law by suing out execution, and must have a return of "no property found" before he will be allowed to proceed in equity. But, as in the other case, the law never requires a useless thing; and so, if a court of equity has already taken all of the assets of a corporation into its grasp for the purpose of distributing them among its creditors, it surely could not require every creditor to obtain a judgment, sue out execution, and have a return of "no property." In fact, a court of equity would enjoin the useless and futile prosecution of such suits at law. "All creditors are in a sense deemed to be before the court," and will be bound by the decree. (Story's Eq. Pl., Sec. 99.)

Fourth. Strangely enough, the court below held that the Louisville Trust Company was not a judgment creditor. The bill of complaint under which the Circuit Court seized the property of the corporation was based on the fact that the appellant and others had judgments establishing the validity of their claims against the defendant Company. The bill states that the United States Circuit Court of Appeals for the Sixth Circuit had decided that "The defendant corporation is liable on such guaranty to all persons who obtained such bonds for value and without notice that the majority of its stockholders had not petitioned for or authorized the guaranty," and that such court of appeals further held and decided that "upon the evidence, all of the bonds covered by the decree, except a small number, were acquired in good faith and without such notice, and that the defendant corporation was therefore liable upon such guaranty."

The petition of the Louisville Trust Company to be made a party in the cause sets forth that it was one of the parties in whose favor the Circuit Court of Appeals had so decided. That judgment is in full force and has not been suspended or superseded. It is true that this Court has awarded a writ of certiorari to the Circuit Court of Appeals, and that the cause is now pending in this Court, but the judgment below is still in full force.

The fact is, the jurisdiction and action of the court below were based on the fact that the appellant had such a judgment. And yet the court decided that the appellant had no standing in court because it had no judgment. If the object of the judgment is to ascertain and fix the liability, then the plaintiff is a judgment creditor. If, ordinarily, in addition to such judgment, he must have sued out execution in order to have a standing in a court of equity, the rule can not apply in this case where the court has seized every asset which was subject to execution.

In this case, moreover, the court below, without objection, granted the request of the petition of intervention and allowed the appellant to be made a party to the proceeding in its own behalf. There can be no doubt of the power of the Court in such cases, and the consequent right of the appellant to appeal from any errors in the proceedings affecting his interest.

Sage v. Central R. R., 93 U. S. 412–419;
French v. Gapen, 105 U. S. 509–525.

A decree which barred the equity of redemption, affected the rights of every creditor in whose behalf the Court had seized the property. In fact, the filing of the bill created an equitable levy for the benefit of all persons who were entitled to distribution out of the value of that equity.

III.

The decree of foreclosure was erroneous because it was for more than was enforcible on the mortgages at the time it was rendered.

The Court below decreed that the defendant company should within ten days pay the past due interest on the three mortgages foreclosed, aggregating the sum of $232,477.12, and that unless the said payment should be made within the time directed, the equity of redemption should be foreclosed and forever barred, and that the property should be sold for the purpose of paying the amount so decreed.

It is evident that if this decree required the payment of more than was then enforcible, it was erroneous.

Chicago R. R. Co. v. Fosdick, 106 U. S. 47.

This was assigned for error on appeal, but met with no consideration by the court. Indeed, in the opinion of the Appellate Court, it is said:

> "The *sole* ground of objection to the complainant's case in the court below, as set forth in the petition of appellant, and which was filed after a decree was taken, and which was addressed to the discretion of the Court asking to have the decree set aside, was the total invalidity of the various bonds and mortgages," etc.

This statement is incorrect, for, in fact, not only was the amount of the decree assigned for error, but it was the point most elaborately argued and relied on in the Circuit Court of Appeals, and, as it did not receive consideration there, the appellants now ask it from the Supreme Court. One of the mortgages so foreclosed was given to the Farmers Loan and Trust Company and John H. Barker, trustees, and it was then, and it is now, contended that under that mortgage there was no right in behalf of the trustees to institute proceedings of foreclosure. Their powers and rights are all derived from the deed of trust, which is found in Record, page 69. The provisions of that deed which apply to the question are as follows:

The second provision (R. p. 74) provides:

> "Until default shall be made in payment of the principal or interest secured by said bonds, or some of them, the railroad company shall be permitted to possess, manage, operate and enjoy, all and singular, the mortgaged premises, with their appurtenances, and to take and use the rents, incomes, profits, and issues thereof in the same manner and to the same effect as if this indenture had not been made."

The third clause is as follows:

> "In case default in the payment of interest on any of the bonds secured by this indenture shall be made and *shall continue for the space of six months*, and such payment shall be duly demanded, then the trustees may, and if requested in writing by the holders of the majority of the bonds secured thereby and then outstanding, shall enter upon all and singular the mortgaged premises and every part thereof, and possess, operate, use and enjoy the same; and upon demand in writing being made by the trustees, the railway company shall immediately surrender possession of all and singular the mortgaged premises and property, of every sort and description, to the trustees. It shall also be lawful for the trustees, in case *such default shall be made and continue as aforesaid*, and payment be demanded, and in case such request of bondholders be made, as aforesaid, they shall do so, to sell and dispose of all the premises and property of every sort and description."

Then follow provisions as to manner of sale and disposition of proceeds. The fourth clause provides that

> "In case default in the payment of interest on any of the bonds secured by this indenture shall be made *and shall continue for the space of six months*, and such payment shall be duly demanded, then the trustees, if they shall elect so

> to do, may, and if requested in writing by the holders of one half of the bonds secured thereby and then outstanding, shall apply to any court or courts having proper jurisdiction in the premises for a foreclosure of this deed of trust or mortgage, and sale of the mortgaged premises and property, and for the appointment in the mean time of a receiver of the mortgaged premises under this indenture, the trustees to have the right to nominate and designate the person to be appointed receiver, and so far as lawfully may be done, to control and direct the general course of the administration of the mortgaged premises by and on the part of such receiver. *In the event of such right of foreclosure and sale accruing, for non-payment of interest,* immediately thereupon the whole amount of the principal of the bonds secured by this indenture and then outstanding shall, at the option of the trustees, become due and payable, and this provision is expressly declared not to be in the nature of penalty for breach of condition or for the non-payment of interest, but to be a provision which is essentially necessary to carry out the objects and purposes of the parties hereto." (R. pp. 75 and 76.)

Whether or not the other mortgages foreclosed conferred any right upon the trustees to institute proceedings immediately upon default, need not be discussed. The decree on one mortgage, before the trustees were entitled to institute proceedings for foreclosure, makes the decree erroneous. In other words, if the decree *nisi* was for more than sufficient to pay the amount then due and enforcible, it was error, for if the decree had been for the correct amount, then those entitled to redeem might have been able to relieve the forfeiture. Thus, in Chicago R. R. Co. v. Fosdick, 106 U. S. 47–71 :

> " It is obvious that the finding of the amount due, for non-payment of which, according to the terms of the decree, the mortgaged property is ordered to be sold, is the foundation of the right of the mortgagee further to proceed, and a substantial error in that finding must, on appeal, vitiate all subsequent proceedings. Unlike a calculable error in the amount of a personal judgment which may be cured by a *remittitur,* it is otherwise incurable; for as it is an illegal

> exaction, made as a condition for preserving the rights of the mortgagor in his estate, and, if executed, depriving him wrongfully of them, it propagates itself through all subsequent stages of the cause. The right to redeem is a favorite equity, and will not be taken away except upon a strict compliance with the steps necessary to divest it. Bigler v. Waller, 14 Wall, 297; Shillaber v. Robinson, 97 U. S. 68 . . . and the error is as vital where a larger amount than is actually due is ordered to be paid, as where there is a failure to find what amount is due."

The right of the mortgagor in deeds of trust "to stipulate for a breathing spell for the payment of his matured debts" is clear, and the sole question is whether such a stipulation has been made.

Farmers L. & T. Co. v. Chicago R. R. Co., 61 Fed. 546.

In deeds where provisions similar to those in clauses 2 and 3 provide for the exercise by the trustee of the right of possession and sale *without judicial action*, and which limit the exercise of this right, such provisions do not prevent the institution of proceedings in court before the limitation has expired.

Morgan's La. R. R. Co. v. Texas R. R., 137 U. S. 171.

But, on the contrary, if there is a provision in the mortgage which limits the right to institute a suit to foreclose, then that limitation will govern the exercise of the right.

Chicago R. R. Co. v. Fosdick, 106 U. S. 47.

This distinction was drawn and made clear in the case in 137 U. S. 171, *supra*.

It will be observed that in the fourth clause of the Farmers Loan and Trust Company mortgage, the right of the trustee to foreclose is expressly limited. It is provided that "if the default shall continue for the space of six months, *then the trustees may*, and, if requested by the holders of one-half of the bonds, *shall* apply to the Court for a foreclosure." This clause would be unmeaning unless it were given this effect, for, as it says that in that event *they may* institute proceedings, it would be absurd to say that they *might* do it before; and such was the decision in the Fosdick case.

The meaning is, however, put beyond doubt by the following sentence in the same clause: "*In the event of such right of foreclosure* and sale accruing from non-payment of interest, *immediately thereupon* the whole amount of the principal of the bonds secured by this indenture and then outstanding shall, at the option of the Trustees, become due and payable." In other words, the option to declare the principal due arose at the same time as the right to foreclose, and it would be unusual and extraordinary to interpret that to mean the day of the default. It was evident that the right to institute proceedings to foreclose was intended to be postponed until the expiration of six months. In this case the proceedings were begun and the decree entered and the sale made and confirmed, all before the six months had elapsed. The "breathing spell" contracted for was not allowed; in fact, in the rapid progress of this extraordinary foreclosure, *there was no breathing spell anywhere.*

IV.

The court erred in confirming the sale without notice and without time to file exceptions thereto.

In the statement of the case by the court below it is said:

> "The appeal is taken from the decree of foreclosure and sale, and from the order denying the application to set the same aside."

This is incorrect. The petition for the appeal (R. p. 203) complains of errors in the orders and decrees designated and set forth in an Assignment of Errors, and an appeal is prayed against the purchasers. The tenth assignment of errors is as follows:

> "The court erred in confirming the sale herein, and in not giving time in which to file exceptions to the same."

So that the appeal in this case was also from the order confirming the sale. The error consists in not laying over the report, so as to give the parties opportunity to except to it. The report of sale was filed on the 10th of March, 1897, and was confirmed on the same day by the consent of the mortgagees, the Railroad Company, and the original creditor, John T. Mills. The Louisville Trust Company was not present, had no notice, and no opportunity was given it to except to the sale. And this was done, though on the day before it had filed its petition contesting the correctness of the judgment and praying that the decree of sale be set aside, or that the sale be postponed.

It has been often held that an order of confirmation of sale is a final decree, and an appeal would lie by any person who had interest in the matter.

> Blossom v. R. R. Co., 1 Wall. 65;
> Butterfield v Usher, 91 U. S. 246; and in

Sage v. R. R. Co., 96 U. S. 712, the Court said:

> "We have often decided that a decree confirming a sale, if it is final, may be appealed from. In this case it is final, so far as the title under the sale is concerned. It cuts off the equity of redemption by the railroad company and the junior mortgagees and *general creditors*, except as provided in the decree of October 22d, and passes the title to the purchaser subject to certain trusts already fixed by the Court, over which the present appellants have control only through their appeal from the former decree. No reversal of any order hereafter made will necessarily divest this title. The proceedings hereafter will relate only to the disposition of the property acquired by the purchase and the proceeds of the sale. For relief against the sale, resort can alone be had to an appeal from the decree of confirmation."

The practice in England, and which has been approved in this country, is that a decree for the confirmation of a sale must give time for filing exceptions thereto, and this has been approved and is the practice adopted by the United States Courts of Equity.

Pewabic Mining Co. v. Mason, 145 U. S. 349–364;
Mayhu v. West Virginia Oil Co., 24 F. R. 205;
Central Trust Co. v. Sheffield Co., 60 F. R. 9.

V.

The Mortgages foreclosed were, by the laws of the State of Illinois, void as to property within that State.

The Circuit Court, in its decree, adjudged that the mortgages were a valid lien upon the property of the Company in the State of Illinois. The mortgages purport to cover a leasehold of a railroad and of terminals in that State, but does not state the terms of the lease. It is submitted that it makes no difference whether it be a leasehold or a freehold. It is property situated in the State of Illinois. No authority need be cited for the doctrine that in such case the validity of the mortgage must depend upon the local law. The rule is absolute. And in such cases it was well said by Mr. Justice Brewer, in Detroit v. Osborne, 135 U. S. 498:

> "Even if it were a fact that the universal voice of the other authorities was against the doctrine announced by the Supreme Court of Michigan, the fact remains that the decision of that Court, undisturbed by legislative action, is the law of that State."

The title of the Louisville, New Albany & Chicago Railway Company to the property in Illinois was derived as follows:

The Chicago & Dyer Railroad Company, a corporation of Illinois, was chartered to construct a railroad from Chicago to the Indiana State line. The Chicago & Indianapolis Air Line Railroad Company was an Indiana corporation, chartered to construct a railroad from Indianapolis to the State line. These two corporations were consolidated, or attempted to be consolidated, *in* 1881, under the name of the Chicago & Indianapolis Air Line Railroad Company. Afterward this Company was incorporated with the Louisville, New Albany & Chicago Railway Company, another corporation of Indiana. At the time of the consolidation of the Chicago & Dyer Railroad Company and the Chicago & Indianapolis Air Line Railroad Company, there was no law in the State of Illinois which authorized a consolidation of a railroad company in that State with a railroad company in another State, and no such law was passed *until* 1883. The effect of an attempt at such consolidation came before the Supreme Court of Illinois in the case of the American Loan and Trust Company v. Minnesota Co., 157 Ill. 741; 42 N. E. Rep. 153. That court decided that such an attempted consolidation was absolutely void, and that a mortgage executed by such a pretended consolidated company upon property in Illinois was void and of no effect.

The Court in that case said:

> "So the conclusion must be that in 1882 railroad corporations organized under the laws of Illinois had no authority whatever, unless granted in their respective special charters, to consolidate with railroad companies of other States. Indeed, the statutes of the State then in force seem plainly to show a then prevailing legislative and public policy opposed to such consolidations. And it is hardly necessary to suggest that the act of June 14, 1883 (Laws 1883, p. 124; 2 Starr & C. Ann. St. p. 1916), and the act of June 30, 1885 (Laws 1885, p. 29; 3 Starr & C. Ann. St. p. 1031), are not retrospective, and do not affect the questions at issue in this litigation." . . . "For the reasons we have stated, the supposed consolidated corporation of the States of Wisconsin, Minnesota, and Illinois, called the Chicago, Freeport & St. Paul Railroad Company, is not, and never was, a corpora-

> tion either *de jure* or *de facto.* The right of way contracts and the trust deed made to appellant were and are invalid, and this because there was no corporation in existence with capacity to either obtain a right of way or contract or act to be bound. Pearce v. Railroad Co., 21 How. 441.
>
> "The contracts for right of way can not be regarded as contracts made by the landowners with the Chicago, Freeport & Northwestern Railroad Company, of Illinois. They do not purport to be the contracts of said company, and there are no facts stated that show that they are its contracts. The supposed consolidated corporation, being without capacity to make a contract, could neither bind itself nor the Illinois corporation. The resolutions of the Chicago, Freeport & Northwestern Railroad Company, of Illinois, that are set out at large in the bill of complaint, avail nothing. The proposed authority to execute a trust deed and bonds was an authority that was to be exercised either by the Illinois corporation itself or by a consolidated corporation of Illinois, Wisconsin, and Minnesota; and the Illinois company executed no such deed or bonds, and no such consolidated corporation ever had either a *de jure* or *de facto* existence. Besides this, the Illinois company had no power or authority to issue bonds, or authorize any other person or corporation to issue bonds for the purpose of constructing railroads in the States of Wisconsin and Minnesota. The capital and property of the Chicago, Freeport & Northwestern Railroad, of Illinois, could not lawfully be subjected to the payment of the liabilities of the Chicago, Freeport & St. Paul Railroad Company, that was lawfully organized under the laws of Wisconsin and Minnesota, for the construction of certain railroads in said States."

It can not be denied that this is the determined, fixed, absolute law of the State of Illinois. The Circuit Court of Appeals, however, refers to the very recent case of the Continental Trust Co. v. The Toledo Co., 82 F. R. 642, as having decided in opposition to the appellant's contention. It is submitted that that case is not only not inconsistent, but confirms the position. The consolidation in that case took place *after the act of* 1883, and because there could *then* have been such a corporation *de jure*, the Court held that it was one *de facto*. But the contention in this case is not like the one in that case. The assignment of error here was that the Court erred in deciding that the mortgages were valid upon the property *situated within the State of Illinois.* The appellants did not contend that the Indiana corporation had lost its existence, or that the mortgages were not valid upon the property within the State of Indiana. It was insisted only that, *by the law of the State of Illinois, the consolidation was invalid, and that the mortgages were void upon property within that State.* And if the deliberate decision of the highest Court of that State is to be followed in determining such a question, then the mortgages were and are void as to such property.

The statement in the opinion of the Circuit Court of Appeals, that the appellant occupies the anomalous attitude of denying the capacity of the defendant corporation to issue its own bonds to secure its own indebtedness and to enable it to carry on its own business, is not a correct statement of the appellant's attitude. The Court misconceived the position taken by the appellant, and therefore did not consider or pass upon the real question at issue.

VI.

Finally, the appellant complains that, while the Circuit Court of Appeals declared that the petitioner had no standing in Court, and was not entitled, therefore, to have a consideration of the merits of the case, it proceeded to make a decision and render a decree which would forever bind the appellants from attacking that decree which it claims to be fraudulent. Instead of dismissing the bill without prejudice, it dismissed it absolutely, and in its opinion purported to decide questions which were not raised, and to leave undetermined those which were. Surely, it can not be right to hold that a party has no standing in Court, and at the same time render a decree against him upon the merits of the case.

VII.

In this case there are collected and associated together all of those abuses which have made some railroad foreclosures odious. It is seldom, however, that the powers of the Court itself have been used to facilitate and make easy the course of the wrong-doer. The only and best protection now afforded by law to those creditors and stockholders who are not in control of the affairs of the corporation, is founded upon the undoubted integrity and the sharp discrimination of the courts of the United States. It is remarkable, therefore, when the powers of such a Court have, without proper examination, been used to assist and countenance those proceedings which it should be the first to hinder.

ST. JOHN BOYLE,
SWAGAR SHERLEY,
Counsel for Appellant.

IN THE

Supreme Court of the United States.

Filed April 7, 1898.

October Term, A.D. 1897.

THE LOUISVILLE TRUST COMPANY,

Appellant,

against

THE LOUISVILLE, NEW ALBANY AND CHICAGO
RAILWAY COMPANY, AND OTHERS,

Appellees.

Ex parte The Louisville Trust Company.

BRIEF IN OPPOSITION TO APPLICATION FOR A WRIT OF CERTIORARI.

ADRIAN H. JOLINE,
HERBERT B. TURNER,
GEORGE W. KRETZINGER,
E. C. FIELD,
Of Counsel for Appellees.

C. G. Burgoyne, Walker and Centre Streets, N. Y.

In the Supreme Court of the United States.

OCTOBER TERM, A. D. 1897.

THE LOUISVILLE TRUST COMPANY,
Appellant,

vs.

THE LOUISVILLE, NEW ALBANY AND CHICAGO
RAILWAY COMPANY, and others.
Appellees.

Brief in Opposition to Application for a Writ of Certiorari.

This is an application by the Louisville Trust Company for a writ of *certiorari* to the Circuit Court of Appeals for the Seventh Circuit, to review a decree of that court affirming a decree of the Circuit Court for the District of Indiana foreclosing certain mortgages.

The application is made by one who, as the record shows, was never made a party complainant or defendant, and not only never filed a pleading in the cause but never asked leave to file one.

The application should be denied because:

1. The questions are not of that gravity and importance which justify the interposition of this Court.

2. The petitioner is not in a position to raise any of the questions referred to in the petition and supporting brief.

3. There is no merit in any of the contentions of petitioner.

Statement.

On August 24, 1896, John T. Mills, Jr., obtained a judgment in the Circuit Court of the United States for the District of Indiana against the Louisville, New Albany and Chicago Railway Company. Execution thereon was issued and upon its return unsatisfied, Mills filed a creditor's bill in the same court and moved for the appointment of a receiver. A receiver was appointed *(Record*, pp. 2, 10*)*.

In view of the statements of the petitioner that this was a "prosperous railroad company" which "had never made a default in payment on its mortgage bonds," reference may properly be made to the allegations of the Mills bill, none of which have ever been denied.

That bill alleged, among other things, that the floating indebtedness of this "prosperous" company, including the Mills judgment of $494,911, was nearly $1,000,000, to which should be added the alleged liability as guarantor of the Beattyville Company's bonds, making the total floating debt nearly $2,600,000 *(Record*, pp. 4–6*)*.

It also alleged that the Beattyville Company's railroad had never been completed; that the Beattyville Company was insolvent; that the entire Beattyville property was insufficient to pay construction liens ahead of the mortgage; that the Louisville, New Albany and Chicago Company had no resources with which to pay its unsecured debts except the surplus earnings from its road which would remain after paying its fixed charges of $1,200,000 a year; and that depression in business had greatly diminished the earnings *(Record*, pp. 5, 6, 7*)*.

At the outset the court of its own motion made an order requiring the Receiver to file a report within twenty days, showing the obligations of the defendant Railway Company, secured and unsecured, when payable, and whether, after paying operating expenses the interest could be paid on the mortgage bonded debt as it matured, so as to prevent default *(Record*, p. 13*)*. The Report does not appear in the record, but it was in fact filed, and this Court will presume that the Report was made in compliance with the order and that the court was satisfied that payment of the interest on the bonded debt was impossible.

Thereafter the Farmers' Loan and Trust Company and the Central Trust Company of New York, with their associate trustees, filed their several bills in the same court to foreclose the three mortgages described in the bills *(Record*, pp. 20, 58, 107*)*. Each of the bills alleged insolvency, demand for interest and default; and that the Receiver appointed on the Mills bill was in possession of and operating the mortgaged property.

On November 12, 1896, the two foreclosure bills then on file were by order of the court consolidated with the Mills bill *(Record*, pp. 97, 98*)*, and on December 21, 1896, the third foreclosure suit was also consolidated with the other consolidated suit *(Record*, pp. 145, 146*)*.

On December 24, 1896, the Farmers' Loan and Trust Company and John H. Barker, as trustees, filed an amended and supplemental bill relative to certain branch properties *(Record*, pp. 146, 147*)*, and thereafter the two branch companies were made defendants *(Record*, p. 160*)*. On the motion of the trustees the court extended the receivership in the Mills suit to the consolidated cause.

The several defendants answered the several foreclosure bills but did not put in issue any of the material allegations of the bills *(Record*, pp. 163-165*)*. The various defendant trustees also answered, admitting the allegations of the several foreclosure bills *(Record*, pp. 165, 166*)*.

Hence, on January 23, 1897, the pleadings of all the parties defendant to the foreclosure bills being on file and there being no material allegations of said bills in issue or denied, and no proofs being required in order to authorize the entry of a decree of foreclosure and sale, application was duly and regularly made to the Court for such decree upon bills and answers.

On the same day the Louisville Trust Company filed an intervening petition *(Record*, pp. 166-168). This petition set forth facts tending to show only that the petitioner was a general creditor of the Louisville, New Albany and Chicago Railway Company, and prayed that it might be authorized to appear on its own behalf and on behalf of all others holding similar claims and take such steps and proceedings as it might be advised by counsel. *It did not contain a single allegation tending to controvert any allegation of any of the foreclosure bills and offered no issue upon any point embraced in those bills.* No answer, demurrer or other pleading of any description was tendered to the Court and no application made for leave to file any pleading.

The Court made an order that the Louisville Trust Company and the Kentucky National Bank might be admitted to appear in the proceedings in the cause, each on its own behalf *(Record*, p. 166*)*, and at the same time made and entered the decree of foreclosure and sale *(Record*, pp. 168-188).

The decree adjudged that all the material allegations of the foreclosure bills were true and directed foreclosure of the several mortgages and a sale thereunder. It made express provision for the payment of receiver's indebtedness and of any claims which might be adjudged to be prior in lien to the mortgages foreclosed, reserving the right to retake the property in case of the failure of the purchaser to comply with any order of the court in respect thereto *(Record*, pp. 185, 186*)*. It also adjudged that all questions not thereby disposed of should be reserved for future adjudication, and the court reserved "full power to adjudge with respect to the income of the receivership and the rights of creditors in and to the same."

On February 27, 1897, thirty-five days after the entry of the foreclosure decree, the Louisville Trust Company filed a second petition *(Record*, pp. 189-198*)*. This was filed without prejudice to the right of the complainant to move to strike the same from the files *(Record*, p. 189*)*. This petition contained various charges and allegations tending to negative the right of the trustees to foreclose their mortgages, and prayed that the decree of foreclosure and sale be set aside, that the mortgages should be declared to be invalid, and that the assets of the railway company should be ascertained and the same distributed among general and unsecured creditors. It also prayed that an order should be entered commanding some of the parties to the consolidated cause, but not all, to appear and plead to the allegations of the petition.

No such order to plead was ever made, and it does not appear by the record that any application for it was made, except only by filing the petition.

No showing or excuse of any kind was made for not setting up these alleged defenses before the entry of the decree of foreclosure, and even this petition did not ask leave of the court to interpose any answers or demurrers to the bills.

On March 9, 1897, the day before the day fixed for the sale under the decree, this petition came on to be heard, and the court refused to vacate the decree of foreclosure or to postpone the sale *(Order*, *Record*, p. 198*)*.

The sale was made to the bondholders' committee, and on the same day application was made to confirm the sale and the Master's report. All the parties to the foreclosure bill appearing and consenting, an order of confirmation was entered *(Master's report, Record*, pp. 199-201; *Order, Record*, pp. 201-203). The Louisville Trust Company filed its petition of appeal and assignment of errors. The appeal was heard by the Circuit Court of Appeals for the Seventh Circuit, and the decree was affirmed *(Opinion, Record*, pp. 217-223; *Order; Record*, p. 223). The Louisville Trust Company now applies for a writ of *certiorari* to review this decision.

ARGUMENT.

First. THE QUESTIONS PRESENTED BY THE PETITION AND THOSE DECIDED BY THE CIRCUIT COURT OF APPEALS ARE NOT OF THAT "PECULIAR GRAVITY AND GENERAL IMPORTANCE" WHICH THIS COURT HOLDS TO BE ESSENTIAL TO REQUIRE A REVIEW OF THE CONCLUSIONS OF THE CIRCUIT COURT OF APPEALS.

Lau Ow Bew, Petitioner, 141 U. S., 583.
American Coustruction Co. vs. R. R. Co., 148 U. S., 372.

It is not the gravity of the questions as affecting the petitioner nor the importance of the case with respect to the personal rights of the litigant, but it is the peculiar gravity of the questions and their importance to the general public, and the effect of the decision upon the general public and its interest which are to be taken into consideration.

> "This must necessarily be so in any view, and especially when it is considered that the Circuit Court of Appeals was created for the express purpose of relieving this court of the oppressive burden of general litigation which impeded the examination and disposition of cases of public concern and delayed suitors in the pursuit of justice."

In re Woods, Petitioner, 143 U. S., 202.

The Court upon such applications will confine its inquiries and consideration to the opinion and decision of the Circuit Court of Appeals, and will not go outside of such opinion to consider other questions mooted by counsel. It will not consider or review the record or the errors assigned by counsel in argument, for otherwise this Court would be required to try the whole case on petition, and to again rehear it if the application should be granted.

The record involves the ordinary and usual questions arising in cases of foreclosure of railroad mortgages, and the petitioner's rights as a general creditor must depend alone upon the intervening petition of January 23, 1897.

One of the adjudged findings and conclusions of the Circuit Court of Appeals furnishes a complete answer to the application, viz. :

> " The petitioner, after being allowed to file its petition, did not tender any issue or ask leave to file any answer or pleading, so that there was no occasion for the complainants to offer any evidence to substantiate the allegations of the bill, but a decree of foreclosure was regularly and properly rendered upon the bill and answers. Now the appellant comes to this court and asks for all the benefit and advantage that it might have had if it had asked and obtained leave to put in an answer and had produced evidence to defeat the equities of the bill. We know of no precedent for such a practice; it would be a travesty upon equity proceedings" *(Record*, p. 221*)*.

The record verifies this adjudged finding, which is not attacked on any ground whatever in the petition. Without such pleadings and without evidence the Circuit Court of Appeals was bound to affirm the decree. In this situation no question of " peculiar gravity and general importance " can arise, and neither the alleged errors complained of in the petition nor the argument in its support could avail if the cause were heard on an appeal by the petitioner.

We submit, however, that the questions presented by the petition have been repeatedly decided by this Court, and that the opinion of the Circuit Court of Appeals in the disposition of these question is in full accord with those decisions.

It is implied in the brief of petitioner's counsel (pp. 11, 12) that because this Court has granted a writ of *certiorari* to review the decision of the Circuit Court of Appeals for the Sixth Circuit, holding the Louisville, New Albany and Chicago Company liable on the guaranty of the Beattyville bonds, this Court should do the like in this case. But that is a complete *non sequitur*. The questions in the two cases are utterly different. There is no logical or legal similarity between them.

Second. THE PETITIONER HAS NO STANDING TO ASSERT ANY OF THE OBJECTIONS TO THE FORECLOSURE WHICH ARE SET FORTH IN ITS PETITION.

I. It was contended below that, the cause being a consolidated cause, the court could not render a decree of foreclosure until the whole case was ready for final decree ; and that, if the Mills suit was not ready for decree, it was not proper to render a decree on any of the bills. This proposition cannot be sustained.

The consolidation was made in pursuance of the provisions of the Revised Statutes of the United States, Section 921.

In *The Mutual Life Ins. Co. vs. Hillman*, 145 U. S., 285, where several suits had been consolidated under this statute, the Court say :

> "But although the disputants might lawfully be compelled, at the discretion of the court, to try the cases together, the causes of action remain distinguished and require separate verdicts and judgments."

In *Continental Trust Co. vs. Railway Co.*, 82 Federal Reporter, 645, the Circuit Court of Appeals for the Sixth Circuit considered the effect of a consolidation of a creditor's suit with foreclosure suits, and say :

> "Such dependence does not throw both suits into hotchpot and dispense with the ordinary rules of pleading and practice as to parties proper and necessary to each cause of action. Because the *res* acquired under the original bill gives ancillary jurisdiction to entertain a dependent bill seeking relief in respect to the *res*, parties to the original bill are not thereby made parties to the dependent bill. The parties to the original bill have no more right to intervene in the dependent cause than if the court had independent jurisdiction thereof. Hence the rule as to who may appear to a foreclosure bill and file answers is the same here as if the bill had, in fact, been an independent bill."

Under this rule the foreclosure suits were brought to hearing. The intervening petition filed on the same day did not attack or challenge any of the proceedings in the foreclosure suits, nor the validity of the bonds and mortgages; offered no objection to the entry of the foreclosure decree, and presented no excuse or ground for delay of such entry. It rested upon the bare assertion that petitioner holds bonds of a Kentucky railway company, upon which had been endorsed guarantees for payment by the Louisville, New

Albany and Chicago Railway Company, with a prayer that it might be permitted to file the same and take such action in relation thereto as it might be advised.

II. If petitioner, a general and unsecured creditor, were entitled to assert any defense whatever against these bonds and the mortgages securing the same (which is disputed), it was its duty to move the court for leave to present its defense by answer or plea. By failing to do so, it clearly waived any possible right to be heard to object to the foreclosure, either in the court of original jurisdiction or upon appeal, or in this Court on petition for *certiorari.*

The petitioner put itself before the court solely in the light of a general creditor seeking to reach any unmortgaged income or property, and its rights in that respect were fully protected by the decree of foreclosure *(Record*, p. 188*).*

The proper practice with reference to pleading in such cases is indicated in *Toler vs. East Tennessee, Virginia & Georgia Railway Co.*, 67 Federal Reporter, 168. The complainants were not notified that there was any dispute as to the truth of the allegations of their bills, and were not called upon to wait for an indefinite period until the intervenor might choose to present his pleading to the court.

III. The petition of February 27, 1897, cannot be considered, because it was made long after the decree had been entered and filed. The application based upon it was addressed to the favor of the court and was not a matter of right.

IV. The petitioner did not have or assert any lien on the mortgaged premises. Having no lien, it was neither a necessary or proper party to the foreclosure bills.

Bronson vs. Railway Co., 2 Black, 524.
Herring vs. Railway Co., 105 N. Y., 340.
Jones vs. Winans, 20 N. J. Equity, 96.
Stout vs. Lye, 103 U. S., 66.

Third. THERE WAS NO MERIT IN THE OBJECTIONS SET FORTH IN THE SECOND PETITION OF THE LOUISVILLE TRUST COMPANY.

I. The petitioner did not question the fact that the bonds secured by the mortgages were made in good faith and for a valuable consideration and were in the hands of *bona fide* holders. The objections were, in substance, that when the bonds and mortgages securing them were executed, the mortgagor company had no legal existence, because neither Indiana nor Illinois, in which the constituent companies were incorporated, had, by law, authorized the consolidation by which the mortgagor company was formed; and that under one of the mortgages there could be no foreclosure until six months after default.

The Circuit Court of Appeals, in deciding the case, said:

> "The sole ground of objection to the complainant's case, in the court below, as set forth in petition of appellant, and which was filed after the decree was taken and which was addressed to the discretion of the court asking to have the decree set aside, was the total invalidity of the bonds and mortgages."

Record, page 221.

It is now asserted by counsel that the court did not consider the alleged premature filing of one of the foreclosure bills.

If counsel thought that the court below had overlooked any point, it was his duty to have applied for a rehearing on that ground.

This he has not done.

But doubtless the court did not discuss the matter in its opinion, because the objection was of no materiality or importance.

Covenants of this description have been frequently construed, and we find no reported case where they have been held to prevent a foreclosure in equity.

A covenant for six months' possession by a mortgagor after default before a right of entry and sale accrues cannot be availed of by a stranger to the mortgages. It is for the benefit only of the grantor and its assigns.

Guaranty Trust Co. vs. Railway Co., 139 U. S., 143.

In any view touching either a technical or liberal effect to be given to such a covenant, the moment a receiver was appointed in a proceeding adverse to the mortgagor and the mortgaged property had passed into the custody and control of such receiver, the trustees and bondholders were wholly relieved from the operation of the covenant and it became inoperative. The effect of the appointment of a receiver upon a judgment creditor's bill was to remove the income and earnings out of the reach of the bondholders. The rule is well settled that the income and earnings derived from property put in the hands of a receiver at the suit of a judgment creditor cannot be appropriated for the benefit of a mortgagee, notwithstanding the express recital in the mortgage that such income and earnings are made subject to the mortgage lien and are to enure as part of the mortgage security to the benefit of the bondholders. In order, therefore, to bring the income within the mortgage, it was necessary for the mortgagee to file a bill and have his receiver appointed thereon.

See *American Bridge Co. vs. Heidelbach*, 94 U. S., 798.
Railway Co. vs. Cowdrey, 11 Wallace, 459.

These cases show the right and duty of the trustees to have the immediate appointment of a receiver, in order to reach the income and earnings applicable to the mortgage security, thereby preventing them from being taken away from both mortgagor and mortgagee and applied to the benefit of a junior judgment creditor.

It is quite manifest that it would be entirely inequitable to require the trustee to stand idly by for six months after default and allow the security of his *cestuis que trustent* to be absorbed by a junior judgment creditor. Any trustee neglecting to proceed under such circumstances would be derelict in duty.

The right of the trustee to proceed at once under mortgages quite similar in terms to those involved in this suit has been sustained by the courts.

Mercantile Trust Co. vs. Chicago, Peoria & St. Louis Railway Co., 61 Federal Reporter, 372.
Farmers' Loan & Trust Co. vs. Chicago & Northern Pacific R. R. Co., 61 Federal Reporter, 543.

II. It was asserted in the second petition that the bondholders and stockholders of the New Albany Company entered into an arrangement and agreement for the purpose of procuring a sale of the property without the payment of the liabilities of the company (*Record*, p. 193). There is nothing in the way of proof of this allegation, and of course it cannot be considered. If the bonds were valid the enforcement of the mortgages securing them, which would of necessity have cut off floating creditors and subsequent lien holders, would be neither illegal nor fraudulent. If the bondholders had a legal right to collect their debts by foreclosing the mortgages, they could not expose themselves to liability by exercising that right, and an allegation that it was done with fraudulent intent and purpose would amount to nothing.

McLean vs. King, 144 U. S., 260.

Allegations are contained in the second petition that the Mills bill was filed for the purpose of hindering and delaying the general and unsecured creditors *(Record*, p. 192*)*, and that the bills to foreclose were filed for the same purpose. The case of *Continental Trust Co. vs. Toledo, St. Louis & Kansas City R. R. Co.*, 82 Federal Reporter, 642, is cited to support the contention of the petitioner. In that case the court says of like attacks by intervening creditors :

> " They [the intervening creditors] have no standing in court at all to take part in the distribution of the assets of the defendant debtor, save as they accept the tender of the benefit made to them by the complainant in his bill. If they would be independent of this restriction they are at liberty to put their claims in judgment, and after a *nulla bona* return to file a creditor's bill of their own against any defendants they may select, and under it they may dispute all other claims. But, so long as they owe their right to be in court at all to the sufficiency of the averments of the bill for the relief asked, they cannot be heard to question the very basis upon which alone the court can act."

If the charges made by the petitioner against the Mills judgment were true, then under this rule petitioner would have no standing whatever in court ; but in the case cited the court disposes of this question by saying :

" *Undoubtedly an intervening creditor may not defeat the judgment claim of the complainant upon which the bill is founded and the court obtains jurisdiction.*"

In the case last cited, the right of the intervening petitioner to challenge the bonds was put upon the sole ground that the *bondholders themselves* were parties to the creditor's bill, and that the assailing creditor had intervened under the same bill. The court says :

> " In a hearing on a creditors' bill any creditor making himself a party by presenting a claim may be heard to contest the claim of every other creditor seeking payment out of the estate of the debtor. * * * I can see no reason why any creditor intervening in this action under the creditors' bill may not attack the claim of any other creditor seeking the benefit of that bill. The bondholders have

made themselves parties to the creditors' bill by a committee of their number, and have set up their claims and lien."

But the court did not hold that a general creditor could intervene in the foreclosure suits and attack the validity of the bonds and mortgages in those suits.

Nor did it hold that a general creditor, who had intervened without questioning the rights of the bondholders. could, after decree of foreclosure and sale, be heard to attack the bonds and mortgages, no intimation of any intention to do so having been given in any manner prior to the entry of the decree.

III. The contention that the mortgages were void because the consolidated corporation had no legal existence is without merit.

The petitioner's alleged claim is based upon the simple contract of the consolidated corporation, and it occupies the absurd position of insisting that the consolidated corporation could make a valid guaranty of the debt of another corporation, but could not create a debt of its own.

If the bonds were null and void because the consolidated corporation had no legal existence, then the debt of the petitioner is in no better condition, and the Court has nothing upon which to exercise jurisdiction.

Continental Trust Co. vs. Toledo, Kansas City & St. Louis Railway Co., 82 Federal Reporter, 642.

Even if the validity of the consolidation were in issue and on trial in the Illinois court, the effect of the decision in *American Loan & Trust Co. vs. Railway Co.*, 157 Ill., 641, has been entirely destroyed by the curative act of the Illinois Legislature, approved and in force July 9, 1897, which ratifies and confirms all railway consolidations affected by that decision.

See Statute, *post*, page 14.

Fourth. THE ORDER OF CONFIRMATION WAS REGULAR AND PROPER.

All parties consented to the confimation, and the appellant was not a party entitled to notice. The provisions of Equity Rule 83 do not apply.

Pewabic Mining Co. vs. Mason, 145 U. S. 349.

There was no occasion for an order *nisi*. All the parties were before the court and not objecting. The only object of requiring the report to be confirmed is to afford time, between the service of the order *nisi* and confirmation, for others to come in and open the bidding, so as to secure the sale of the estate to the best possible advantage. It is not suggested that there was any one in existence who would have made a higher bid.

Fifth. The proceedings in this case were not conducted secretly; they were matters of public notoriety. No step was taken in the foreclosure suits in advance of the time when, under the rules, the complainants were entitled to proceed. The petitioner, by refusing to proceed in an orderly way, furnishes good reason for the conclusion that its object was not in good faith to procure an adjudication of the merits of the alleged case, but to obstruct and impede the secured creditors in a just and reasonable effort to reorganize an insolvent and defaulting railway corporation.

The learned counsel seems to think that some wrong or injustice was perpetrated, because the law was administered "speedily and gently" (see his *Brief*, p. 13).

The inference is that he thinks the proceedings should have been dilatory. The objection that proceedings in a court of equity have *not* been allowed to drag for long periods has not often been heard.

There is no legal reason why a mortgage upon a railroad should not be foreclosed as speedily as a mortgage upon an ordinary piece of property, and we know of no rule of law which entitles the creditor of a railway company to assume that such mortgages will not be foreclosed promptly where no defenses have been interposed.

Sixth. The prayer of the petition for a writ of *certiorari* should be denied.

Adrian H. Joline,
Herbert B. Turner,
George W. Kretzinger,
E. C. Field,
Of Counsel for Appellees.

Illinois Statute of June 9, 1897.

§ 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* That every agreement, whether in form of deed of sale, articles of consolidation, or otherwise, made and entered into between the first day of July, in the year Anno Domini one thousand eight hundred and seventy-four, and the first day of July, Anno Domini one thousand eight hundred and eighty-three, by and between any railroad company organized under the laws of this State or of this State and any other State or States, and any railroad company or companies organized under the laws of any other State or States, providing or purporting to provide for the consolidation or merger of the capital stocks, corporate and other franchises, privileges and property of the respective companies parties thereto, and under which the consolidated company thereby created or attempted to be created, or its successor or lessee, now owns, controls or operates, or is in possession of, the several railway lines of the respective companies, parties to such agreement, be, and the same is hereby, ratified, approved and confirmed; and all the corporate rights, franchises, privileges and immunities of the several and respective companies, parties to every such agreement, are hereby granted, vested and confirmed in the consolidated company thereby created or attempted to be created for and during the term of its corporate existence and of any renewal thereof.

Laws of Illinois (Bradwell), 1897, pages 198, 199.

No. 263,

FEB 20 1899

Br. of Joline, Turner, [illegible] & Field for Appell

Supreme Court of the United States,

OCTOBER TERM, [illegible]

Filed Feb. 20, 1899.

No. 263.

THE LOUISVILLE TRUST COMPANY,
Petitioner,

vs.

THE LOUISVILLE, NEW ALBANY AND CHICAGO
RAILWAY COMPANY ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SEVENTH CIRCUIT.

Brief for The Farmers' Loan and Trust Company and others, Appellees.

ADRIAN H. JOLINE,
HERBERT B. TURNER,
GEORGE W. KRETZINGER,
E. C. FIELD,
Of Counsel for Appellees.

C. G. Burgoyne, Walker and Centre Streets, N. Y.

Supreme Court of the United States.

OCTOBER TERM, 1898.

THE LOUISVILLE TRUST COMPANY,
Petitioner,
Appellant,

vs.

THE LOUISVILLE, NEW ALBANY AND
CHICAGO RAILWAY COMPANY ET AL.,
Appellees.

No. 263.

Brief for The Farmers' Loan and Trust Company, John H. Barker, the Central Trust Company of New York, John H. Stotsenburg, James Murdock, F. P. Olcott, Henry W. Poor and Henry C. Rouse, Appellees.

This cause comes before the Court upon the return of a writ of *certiorari* to the Circuit Court of Appeals for the Seventh Circuit, to review the decision of that Court affirming a judgment or decree of foreclosure and sale rendered by the Circuit Court of the United States for the District of Indiana.

Statement of Facts.

In August, 1896, the Louisville, New Albany and Chicago Railway Company was a corporation existing under the laws of Indiana, with corporate power to own and operate railways in Indiana and other States. Its line extended from New Albany, Indiana, to Michigan City, Indiana, and from Indianapolis to Hammond, Indiana, and it had leases or trackage rights over the Chicago and Western Indiana Railroad from Hammond, on the westerly boundary line of Indiana, to and into Chicago, and over the Pittsburg, Cincinnati and St. Louis Railway and the Louisville and Nashville Railroad and the Louisville Bridge Company's tracks, from New Albany, Indiana, to and into Louisville, Kentucky. It also held certain shares of stock of other railway companies (*Record*, p. 2).

The bonded debt of the railway company (hereinafter for brevity referred to as the " Monon ") secured by mortgage upon its property or parts thereof was as follows (*Record*, pp. 3, 169-182).

(1) Three million dollars six per cent. bonds, called " Main Line Bonds," secured by mortgage to John C. New and Washington C. DePauw, trustees, dated July 1, 1880, and covering the main road from New Albany to Michigan City, 288 miles.

(2) Two million three hundred thousand dollars six per cent. bonds, called " Air Line Bonds," secured by mortgage to John C. New, trustee, dated August 10, 1881, and covering the road from Indianapolis to Hammond.

(3) Four million seven hundred thousand dollars six per cent. bonds, called " Consolidated Bonds," secured by mortgage to the Farmers' Loan and Trust Company and John H. Barker, trustees, dated January 1, 1886, and covering all the railways and corporate stocks of the Monon.

(4) Two million eight hundred thousand dollars five per cent. bonds, called " General Mortgage Bonds," secured by mortgage to the Central Trust Company of

New York and John H. Stotsenburg, trustees, dated May 1, 1890, covering the same property as the consolidated mortgage.

(5) One million dollars five per cent. bonds called "Equipment Bonds," secured by mortgage to the Central Trust Company of New York and James Murdock, trustees, dated September 1, 1894, covering all the property of the Monon, and constituting a first lien on a large amount of equipment (p. 178). Of these bonds $709,000 were outstanding (p. 179).

NOTE. By some accident the statement of the $2,300,000 Air Line bonds has been dropped out of the Record on page 3. There will be no dispute as to the existence of these bonds.

In 1889 and 1890 the Board of Directors of the Monon had caused to be placed upon $1,185,000 six per cent. bonds of a Kentucky railroad company called the Richmond, Nicholasville, Irvine and Beattyville Railroad Company (hereafter called the Beattyville Company) an endorsement obligating the Monon Company to guarantee the payment of the principal and interest of such bonds. The validity of the alleged guaranty was contested by the Monon, and in a suit prosecuted in the United States Circuit Court for the District of Kentucky the guaranty had been adjudged to be invalid (69 Federal Reporter, 431); that judgment had been reversed by the Circuit Court of Appeals for the Sixth Circuit (43 U. S. Appeals, 550). Upon a writ of *certiorari* the decision of the Circuit Court of Appeals has been brought before this Court, and the matter argued and submitted, but as yet no decison has been rendered.

On August 24, 1896, one John T. Mills, Jr., obtained a judgment in the Circuit Court of the United States for the District of Indiana against the Monon Company for $494,911.35, upon notes given by the company for borrowed money. Execution was issued thereon, and upon its return unsatisfied, Mills filed a creditor's bill in the same Court and procured the appointment of W. H. McDoel as Receiver *(Record*, pp. 2, 10.*)*

In view of the assertion of appellant that this was a "prosperous railroad company" which "had never made a default in payment on its mortgage bonds," reference may properly be made to some allegations of the Mills bill which have never been denied.

This bill alleged, among other things, that the floating debt of the Monon, including the Mills judgment, was nearly $1,000,000. It further referred to the claim of the appellant and others, based upon the guaranty of the Beattyville bonds, which amounted to $1,185,000, with over forty-two per cent. interest *(Record*, pp. 4, 5*)*.

It also alleged that the Beattyville Company's railroad had never been completed; that the Beattyville Company was insolvent; that the entire Beattyville property was insufficient to pay construction liens ahead of the mortgage; that the Louisville, New Albany and Chicago Company had no resources with which to pay its unsecured debts except the surplus earnings from its road which would remain after paying its fixed charges of $1,200,000 a year; and that depression in business had greatly diminished the earnings *(Record*, pp. 5, 6, 7*)*.

At the outset the Court of its own motion made an order requiring the Receiver to file a report within twenty days, showing the obligations of the defendant railway company, secured and unsecured, when payable, and whether, after paying operating expenses, the interest could be paid on the mortgage bonded debt as it matured, so as to prevent default *(Record*, p. 13.*)* The report does not appear in the record, but it was in fact filed, and this Court will presume that the report was made in compliance with the order, and that the

Court was satisfied that payment of the interest on the bonded debt was impossible.

Thereafter the Farmers' Loan and Trust Company and the Central Trust Company of New York, with their associate trustees, filed their several bills in the same court to foreclose the three mortgages described in the bills *(Record*, pp. 20, 58, 107*)*. Each of the bills alleged insolvency, demand for interest and default; and that the Receiver appointed on the Mills bill was in possession of and operating the mortgaged property.

On November 12, 1896, the two foreclosure bills then on file were by order of the Court consolidated with the Mills bill *(Record*, pp. 97, 98*)*, and on December 21, 1896, the third foreclosure suit was also consolidated with the other consolidated suit *(Record*, pp. 145, 146*)*.

On December 24, 1896, the Farmers' Loan and Trust Company and John H. Barker, as trustees, filed an amended and supplemental bill relative to certain branch properties *(Record*, pp. 146, 147*)*, and thereafter the two branch companies were made defendants *(Record*, p. 160*)*. On the motion of the trustees the Court extended the receivership in the Mills suit to the consolidated cause.

The several defendants answered the several foreclosure bills, but did not put in issue any of the material allegations of the bills *(Record*, pp. 163-165*)*. The various defendant trustees also answered, admiting the allegations of the several foreclosure bills *(Record*, pp. 165, 166*)*.

Hence, on January 23, 1897, the pleadings of all the parties defendant to the foreclosure bills being on file, and there being no material allegations of said bills in issue or denied, and no proofs being required in order to authorize the entry of a decree of foreclosure and sale, application was duly and regularly made to the Court for such decree upon bills and answers.

On the same day the Louisville Trust Company filed an intervening petition *(Record,* pp. 166-168*)*. This petition set forth facts tending to show only that the petitioner was a general creditor of the Louisville, New Albany and Chicago Railway Company, and prayed that it might be authorized to appear on its own behalf and on behalf of all others holding similar claims and take such steps and proceedings as it might be advised by counsel. *It did not contain a single allegation tending to controvert any allegation of any of the foreclosure bills and offered no issue upon any point embraced in those bills.* No answer, demurrer or other pleading of any description was tendered to the Court, and no application made for leave to file any pleading·

The Court made an order that the Louisville Trust Company and the Kentucky National Bank might be admitted to appear in the proceedings in the cause, each on its own behalf *(Record,* p. 166*)*, and *at the same time* made and entered the decree of foreclosure and sale *(Record,* pp. 168-188*)*.

The decree adjudged that all the material allegagations of the foreclosure bills were true, and directed foreclosure of the several mortgages set out in the bills of complaint of the trustees and a sale thereunder. It made express provision for the payment of the Receiver's indebtedness and of any claims which might be adjudged to be prior in lien to the mortgages foreclosed, reserving the right to retake the property in case of the failure of the purchaser to comply with any order of the Court in repect thereto *(Record,* pp. 185, 186*)*. It also adjudged that all questions not thereby disposed of should be reserved for future adjudication, and the Court reserved " full power to adjudge with respect to the income of the receivership and the rights of creditors in and to the same."

On February 27, 1897, thirty-five days after the entry of the foreclosure decree,. the Louisville Trust Company filed a second petition *(Record,* pp. 189-198*)*.

This was filed without prejudice to the right of the complainants to move to strike the same from the files (*Record*, p. 189). This petition contained various charges and allegations tending to negative the right of the trustees to foreclose their mortgages, and prayed that the decree of foreclosure and sale be set aside, that the mortgages should be declared to be invalid, and that the assets of the railway company should be ascertained and the same distributed among general and unsecured creditors. It also prayed that an order should be entered commanding some of the parties to the consolidated cause, but not all, to appear and plead to the allegations of the petition.

No such order to plead was ever made, and it does not appear by the record that any application for it was made, except only by filing the petition.

No showing or excuse of any kind was made for not setting up these alleged defenses before the entry of the decree of foreclosure, and even this petition did not ask leave of the Court to interpose any answers or demurrers to the bills.

On March 9, 1897, the day before the day fixed for the sale under the decree, this petition came on to be heard, and the Court refused to vacate the decree of foreclosure or to postpone the sale (*Order, Record*, p. 198).

The sale was made to the bondholders' committee and on the same day an application was made to confirm the Master's report. All the parties to the foreclosure bills appearing and consenting, an order of confirmation was entered (*Record*, pp. 199-201, 201-203).

Thereafter the Louisville Trust Company filed a petition of appeal and assignment of errors (*Record*, pp. 203-206). The appeal was heard by the Circuit Court of Appeals for the Seventh Circuit and the decree was affirmed (*Opinion, Record*, pp. 217-223).

On March 21, 1898, the Louisville Trust Company filed its petition for a writ of *certiorari*, which was granted by this Court *(Record*, p. 225*)* and the return was duly filed September 8, 1898.

The other material facts will be referred to in the argument.

ARGUMENT.

FIRST. The Louisville Trust Company, the petitioner and appellant, had no standing in court to assert any objections to the entry of the decree of foreclosure and sale.

I. It is not necessary to support by reasoning the proposition that a complainant in a suit to foreclose a mortgage is entitled to a decree upon his bill unless a defendant in the suit interposes some defense by answer or demurrer. The complainant is entitled to a decree according to the prayer of his bill, if no party contests, by a proper pleading, his right thereto. No answer or demurrer on the part of the appellant was even filed or even offered.

Upon this hearing we find an appellant who never filed a pleading in the cause, either to the creditor's bill or to any of the foreclosure bills, and who, so far as the record shows, *was never even made a party defendant.*

For appellant, being a general creditor, was in that respect in like situation with Mills, the complainant in the judgment creditor's suit, whose bill was filed "in behalf of himself and all others in like relation" to the property of Monon *(Record*, p. 8*)*.

The order admitting appellant as a party simply provided "that the said Louisville Trust Company and the said Kentucky National Bank be, and they are hereby, admitted to appear in the proceedings in this case, each in its own behalf." They had not asserted any *lien*, or asked to be admitted as defendants to the foreclosure bills. They had no judgments, and in that respect they did not bear the same relation to the property of the Monon. But at the most, they could appear only as co-complainants with Mills, and as they neither filed nor asked to file any answers or defenses of any description, they must have adopted his bill of complaint and all its allegations. That bill admitted and asserted the validity and priority of the mortgages.

If appellant had intended, in good faith, to defend against the mortgages, it should have prayed leave to plead to the foreclosure bills and tendered some issue to the complainant mortgagees.

The Circuit Court of Appeals, in its opinion, very forcibly and tersely says :

> " The appellant comes to this Court and asks for all the benefit and advantage that it might have had if it had asked and obtained leave to put in an answer and had produced evidence to defeat the equities of the bill. We know of no precedent for such a practice ; it would be a travesty upon equity proceedings" *(Record*, p. 221*)*.

The attention of the Court is especially directed to the fact that the petition on which appellant was allowed to become a party *(Record*, pp. 166-168*)* "alleged nothing whatever against the foreclosure or the validity of the mortgages, or the equities of the complainants' case, but merely set up facts which would entitle the petitioner to share in any surplus or assets not covered by the mortgages " *(Record*, p. 221*)*.

II. If the appellant, a general and unsecured creditor, were entitled to assert any defense whatever against the mortgages (which is not admitted), it was its duty to move the Court for leave to present its defense by demurrer, plea or answer. By failing to file a pleading it waived any possible right to be heard to object to the foreclosure, either in the Court of original jurisdiction or in any appellate tribunal.

The proper practice is well set forth in *Toler vs. East Tennessee, Virginia and Georgia Railway Company*, 67 Fed. Rep., 168. In that case certain persons sought to intervene for the purpose of defeating the foreclosure of a railway mortgage. Judge LURTON says :

> " An application to be allowed to answer and defend and to file a cross-bill should be accompanied by the proposed pleading. The analogy between such an application and an application to file an amended or supplemental answer, or to set aside a *pro confesso* and be allowed to answer is most obvious. In either of the analogous cases the application should be by petition accompanied by a full copy of the proposed pleadings (1 Daniell, Ch. Pl., 4th Am. Ed., 781 ; Beach, Mod. Eq. Prac., § 394). The object in requiring an appli-of this nature to be accompanied by a full answer is, first, not to delay the complainant in his suits, and, second, that the Court may see that a real defense is presented (pp. 174, 175).

The complainants were not notified that there was any dispute as to their right of recovery, and were not called upon, by any rule of law, to wait for an indefinite period until the appellant might, at its convenience, see fit to plead to the bills.

III. The second petition, filed after the decree of sale, was too'late. The application based upon it was addressed only to the favor of the Court. Its consideration involved no matter of right, but merely a question of discretion as to the opening of the decree. This Court will not review that exercise of discretion.

IV. The appellant was neither a necessary nor a proper party to the foreclosure bills, because it neither had nor asserted any lien by judgment or otherwise, upon the mortgaged premises.

It was an unsecured creditor without lien, and " it had no right to interfere in the contests between its debtor and third parties."

Bronson vs. Railway Co., 2 Black., 524.

Herring vs. Railway Co., 105 N. Y., 340.
Jones vs. Winans, 20 N. Y. Eq., 96.
Stout vs. Lye, 103 U. S., 66.

It is not intended to assert that a general creditor may not, upon allegations of fraudulent collusion between a debtor and his mortgage creditors, be admitted to contest the enforcement of a mortgage lien upon the debtor's property, for it is not necessary to so contend in this case. The appellant did not resort to any proceeding based upon any such allegations to present that issue in such a manner as to enable the complainants to have an adjudication.

It merely came into Court on the same day and *at the same time* that the foreclosure decree was entered (*Record*, p. 168); asserted that it was a general creditor of the mortgagor, and interposed no objection to the foreclosure.

But, if the appellant were entitled to be heard to assert any of the errors assigned, there is no merit in any of the objections urged against the decree.

Second. THE DECREE OF FORECLOSURE AND SALE WAS NOT ENTERED PREMATURELY. THE COMPLAINANTS IN THE BILLS OF FORECLOSURE WERE ENTITLED TO A DECREE UPON THE BILLS AND ANSWERS.

The appellant insists that, because the foreclosure suits and the general creditor's suit had been consolidated into one suit, no decree could be entered upon the foreclosure bills separately, and that the whole suit must be determined by a single decree, rendered upon the Mills bill as well as the bills of the mortgage trustees.

This proposition cannot be sustained.

I. As matter of fact, the Mills suit was ready for decree. The railroad company, defendant, had admitted by answer all of the allegations of that bill. A decree rendered upon the Mills bill could have affected only the general assets of the debtor not covered by the mortgages and applicable only to the claims of general creditors. The fact that no one asked for such a decree does not affect the question whether or not that cause was ready for decree.

II. But the complainants in the foreclosure bills were not obliged to wait until the general creditor's suit was ripe for decree.

It would be a strange thing if a general creditor could seize mortgaged property in a suit begun in advance of a default on the mortgage, thereby drawing into the particular court the sole jurisdiction of all suits affecting the *res*, and then compel the bondholders to wait for the settlement of matters in dispute between the debtor and his general creditors.

The suits were consolidated in accordance with the following provision of the Revised Statutes of the United States:

> "When causes of a like nature, or relative to the same question, are pending before a court of the United States, or of any Territory, the court may make such orders and rules concerning proceedings therein *as may be conformable to the usages of courts for avoiding unnecessary costs or delay in the administration of justice*, and may consolidate said causes when it appears reasonable to do so."
>
> *U. S. Rev. Stat.*, § 921.

In *Mutual Life Ins. Co. vs. Hillman*, 145 U. S., 285, where several suits had been consolidated under the authority of this statute, the Court say:

> "But, although the disputants might lawfully be compelled, at the discretion of the Court, to try the cases together, the causes of action remained distinct, and required separate verdicts and judgments."

It appears, therefore, that there is no foundation for the contention that there may be but one judgment in a consolidated cause. The order in this case was "conformable to the usages of courts," and served to "avoid unnecessary delay."

The nature of a consolidated cause of this description was considered by Judge Taft, in the United States Circuit Court for the Northern District of Ohio, in thecase of *Continental Trust Company vs. Toledo, St. Louis and Kansas City Railroad Company*, 82 Fed. Rep., 645. In that case there was a judgment creditor's bill, under which a Receiver was appointed, a subsequent foreclosure bill, and order consolidating both suits. A motion was made to dismiss the foreclosure bill, on the ground that the Court had no jurisdiction of the foreclosure bill, and also to set aside the order of consolidation. It was admitted that there was jurisdiction of the creditors' bill. The Court, holding that the possession under the creditors bill was sufficient to sustain jurisdiction, and referring to the foreclosure bill as a dependent bill ancillary to the creditors' action, says:

> "Care must be taken not to give too much effect to the dependence of one suit on the other for jurisdictional purposes. *Such dependence does not throw both suits into hotchpot, and dispense with the ordinary rules of pleading and practice as to parties proper and necessary to each cause of action.* * * * The rule as to who may appear to a foreclosure bill and file answers is the same here as if the bill had in fact been an independent bill. In other words, the relation between the two suits is principal and ancillary only so far as that, without possession of the *res* in the former suit, the court would have no jurisdiction of the latter; but, having thus acquired, and thus maintaining, its jurisdiction in the second suit, *the court proceeds in it without further regard to the pleading or course of the principal action.* In view of their relation to each other, there cannot be the slightest objection to consolidating the two suits, if they are otherwise of such a character as to permit it. I shall not stop to discuss the power of the court in this regard. It suffices to say that the duty of the court to consolidate causes, where no one will be injured thereby, is plainly sug-

gested by the Federal statute on the subject (Revised Statutes, sec. 921), and one of the commonest instances of the exercise of this power is the consolidation of a creditors' bill and a foreclosure bill against the same insolvent railroad corporation."

There was no reason upon the record why the foreclosure should be delayed to audit the ascertainment of the general assets and the amount of the unsecured debts.

Here were foreclosure cases which were ripe for decree. A general creditor, on the same day that the decree is entered, files an intervening petition, which alleges nothing against the foreclosure, but merely sets up such facts as would entitle the petitioner to share in any assets not subject to mortgage. The complainants are not notified that there is any dispute as to the truth of the allegations of their bill, no answer or pleading is tendered, and they proceed to decree. What should they do? Should they wait an indefinite period, until this intervenor might choose to present his pleading to the Court? Is there any rule of law or practice which requires them to call upon such intervenor to plead to the bill, when he asserts no right except that of a general creditor, and so far as such rights are concerned he is in court already in the person of the debtor and mortgagor corporation?

When it is considered that to this day there has never been an issue tendered to the mortgage trustees, upon which they could take testimony or prove the allegations of their bills, it will be seen that to require them now to sustain their decree as if upon proofs would be most unjust.

The contention of the appellant below was that "if the decree and sale stand, general creditors of the 'Monon' have had the entire property of their debtor sold without their having a hearing or being given an opportunity to prevent the need of a sale." This implies that no mortgaged property may be sold under any foreclosure until general creditors have been made parties to the foreclosure proceeding. There is no such rule of law.

The question before the Court was not whether a sale was needed or not, but whether the complainants were entitled to a decree of sale.

Counsel said in the court below :

> " We do know, however, that this suit was only instituted to free the 'Monon' from the debt that the Circuit Court of Appeals for the Sixth Circuit has said it incurred by its guaranty of the Beattyville bonds. We do know that during times much worse than those existing at the time of and since the filing of this suit the 'Monon' always was able out of its earnings to pay the interest on its bonded indebtedness."

Counsel certainly did not know any such alleged facts from anything in the record. The statements quoted are not sustained by anything which appears before this Court.

Counsel said : " We are certainly entitled to an opportunity to present our claims." The difficulty is that, having had full opportunity at any time between November 12, 1896, and the date of the decree, to appear, be made a party defendant in and plead to the foreclosure bills, appellant refrained from doing so, and seemed to be under the impression that it was the duty of the Court and of the parties to delay the proceedings until such time as, in the good pleasure of the appellant, it should see fit to come into Court in the usual way.

There is nothing in the record to show that any party or person entitled to be heard made any objection to the entry of the decree of foreclosure and sale. It is too late, after the decree has been entered, for an intervenor to object. Such application must be addressed to the favor of the Court. It is not a matter of right. The appellant made such an application, which was denied.

Third. THE TRUSTEES IN THE MORTGAGES ON WHICH THE DECREE WAS ENTERED WERE ENTITLED TO INSTITUTE THEIR SEVERAL PROCEEDINGS ON SUCH MORTGAGES AT THE TIME WHEN INSTITUTED, AND THE CIRCUIT COURT DID NOT ERR IN DECIDING THAT, ACCORDING TO THE TERMS OF THE SAID MORTGAGES, THEY WERE ENTITLED TO A DECREE OF FORECLOSURE AND SALE.

I. The appellant's counsel did not dispute, in the Court below, that the mortgages other than the Farmers' Loan and Trust Company mortgages were, by their terms, enforceable immediately upon default in the payment of interest; but it was contended that the consolidated mortgage could not be foreclosed until the default in payment of interest had existed for six months.

The mortgage in question provides that until default shall be made in the payment of the principal or interest, the mortgagor may remain in possession; and that, if default shall be made and continue for six months, the trustee may enter upon the premises and sell the property *(Record*, pp. 74, 75*)*.

It also contains a provision that, if default in payment of interest be made and continue for six months, the trustees may apply to a Court for foreclosure, and for the appointment of a Receiver *(Record*, p. 75*)*.

Covenants of this description have been frequently construed, but we find no reported case where they have been held to prevent a foreclosure in equity.

Counsel contends that the numerous cases, some of which are referred to in his brief, in which it has been held that the six months' postponement common in mortgages of this description does not prevent application to the Court for foreclosure, have proceeded solely upon the ground that such six months' postponement applies only to the summary right of entry and sale by the trustee, and, being cumulative, does not apply to an equity proceeding to foreclose. It is argued that a provision permitting the trustee to foreclose by suit in equity after default shall have been made and continued for six months is an exclusion of any right to act before that time, according to a familiar maxim.

Some of the adjudicated cases have proceeded upon that ground, but not all.

In *Mercantile Trust Co. vs. Chicago, Peoria and St. Louis Railway Co.*, 61 Federal Reporter, 372, the mortgage provided—as in the present case—that, in case default should be made in the payment of interest, and such default should continue for the space of six months, it should be the duty of the trustee to take appropriate proceedings at law or in equity to enforce the rights of the bondholders, upon a requisition to that effect by the holders of one-third in amount of the bonds. It was urged that this prevented a foreclosure until the six months should have expired.

Judge Woods, holding to the contrary, refers to the second article of the mortgage, limiting the right of the mortgagor to continue in possession until default in the payment of interest (which is exactly similar to the corresponding clause in the consolidated mortgage), and to the third article of the mortgage, which related to the summary right of entry and sale. He says:

> "It is claimed, and I think correctly, that the trustee's right to take possession under the third article is limited to cases where interest has been overdue for six months, and it is insisted that his right to foreclose and to procure a Receiver to take possession under the order of the Court, is likewise limited. If that were so, then the possession of the mortgagor could not be disturbed for any default until after the lapse of six months, and the second article would be entirely nugatory; and, without the consent of the holders of two-thirds of the bonds, there could be no foreclosure—a proposition by which the minority might nullify the rights of the majority."

Judge Woods states so clearly the reason for not construing these permissive clauses to be exclusive that we quote his language:

"A mortgage is a security for a debt. A failure to pay the debt, in whole or in part, when it is due, is necessarily a breach. That is an inherent or essential feature of a mortgage, and the right to enforce the security in court is not to be construed away, or regarded as limited, except by clear expression. In the case of Guaranty Trust, etc., Co., vs. Green Cove, etc., R. Co., 139 U. S., 137, 11 Sup. Ct., 512, it is held that it cannot be absolutely abrogated. That is authoritatively settled; whether upon good reason need not be considered. The cases cited wherein the right of the trustee was declared to be restricted have reference to special powers to be exercised by the trustee without the aid or order of a Court, powers not necessarily inherent in or essential to the very definition of a mortgage. The right of a trustee to take possession is not essential. It may or may not exist, and when it is given in connection with clauses that limit the exercise of it, even though the terms used be permissive, they will be regarded as exclusive. And so, too, a right to sell at public auction without foreclosure and like special powers, will be considered as controlled by such limitations as the mortgagor chooses to impose. Counsel has insisted upon the significance of the case of Railroad Co. vs. Fosdick, 106 U. S., 47, 1 Sup. Ct., 10, where the Court says that if, as a matter of fact, the principal debt had been declared due, still the trustee would not have been entitled to sue for a foreclosure of that part of the debt without averring the request of the bondholders provided for in the clause of the mortgage then under consideration. Counsel asked: 'How is that to be distinguished from a suit to foreclose for the interest which has become due?' If the trustee has it within his power to declare, and declares the principal debt due, that is then as much due as the interest, and, therefore, the rule with reference to them must be the same. That is the argument, and it is certainly not without a good deal of force; but, in the same case we find the Court saying that either the trustee or the bondholders might have a foreclosure for default in the payment of the interest; and the reason for the distinction is given at length in the opinion."

In the case of *Central Trust Company vs. St. Joseph and Grand Island Railroad Company*, which was decided in the United States Circuit Court for the District of Nebraska by Mr. Justice SANBORN in November, 1895, the same question arose. The mortgage in that case provided that if default should be made in the payment of interest, and should continue for six months, it should be lawful for the trustee to foreclose by judicial proceedings.

It was insisted—as it has been in this case—that the permissive clause excluded a remedy by foreclosure before the lapse of the six months.

The decision of Mr. Justice SANBORN has not been reported, but he held that the mortgage was given to secure the payment of a debt; that whenever a coupon representing interest became payable, a bill to foreclose might be maintained, in the absence of any stipulation by which the mortgagee agreed that it would not exercise the right which it had in equity; that the foreclosure might proceed unless there was the express prohibition of such equitable right; and he laid stress—as Judge WOODS did—upon the possession clause. In considering whether the permission to foreclose after six months took away the immediate right of foreclosure, he said that if a promissory note was made payable at the end of four months, and there was added to it the provision that in six months an action might be maintained upon it, it would not deprive the owner of the note of the right to proceed immediately upon default in payment of the debt; and, after a careful consideration of the decisions, some of which are referred to in appellant's brief, and others cited in the Toler case, *supra*, he held that without an express prohibition, or express agreement that the right to foreclose should not be exercised till the expiration of six months after demand in writing, that right existed, and immediate suits for foreclosure might be maintained.

In *Farmers' Loan and Trust Co. vs. Chicago and Northern Pacific Railroad Co.*, 61 Federal Reporter, 543, there were provisions regulating the right of the trustee to enter and sell, in case of default for six months, and also a provision that it should be the duty of the trustee, upon a requisition of bondholders, to proceed to enforce the bondholder's rights, either by the exercise of the summary powers, or by suit or suits in equity. It was contended that this provision prohibited the institution of a suit in chancery to foreclose for default in interest until the default should continue for six months.

It was held by Mr. Justice JENKINS that this provision in no way affected the right of the trustee to foreclose immediately upon default in payment of interest. It did not interfere with the exercise of the discretion of the trustee to act, or limit its right to act immediately upon default. He said that, while it was true that a mortgagor had the right to stipulate for a breathing spell for the payment of his matured debt, it was still true that the limitations upon the powers of the trustee to take legal proceedings to enforce payment upon default should be strictly construed (citing *Guaranty Trust Co. vs. Green Cove R. R.*, 139 U. S., 137).

The case of *Chicago and Vincennes Railway Co. vs. Fosdick*, 106 U. S., 47, upon which counsel for appellant relies, does not sustain his contention. The decision in that case was that a foreclosure bill would not lie within the six months to foreclose *for principal* where the mortgage provided that the principal could not be declared due or foreclosure for principal had until after six months' default in the payment of interest, but the Court sustained the right to foreclose forthwith for non-payment of interest.

II. But if there were any ground for construing the provisions of this mortgage as preventing a foreclosure by suit until after six months' default, the objection can be made only by the mortgagor defendant. It did not take advantage of the objection, and no one else can do so now.

Guaranty Trust Co. vs. Green Cove R. R., 139 U. S., 137.

In the case cited Mr. Justice Brown says (p. 143) :

" Again, it is evident that this was a condition for the benefit of the grantor and its assigns, and that intervening lien holders and those who have purchased the property under decrees in their favor do not stand in a position to take advantage of this covenant. The sole object of the covenant was to protect the mortgagor against a seizure and sale of its property for non-payment of interest or principal at the mere caprice of the trustee, or without the consent of a majority of the bondholders, and it has no application to a case where the mortgagors have already lost the property under adverse proceedings instituted by parties having no connection with the mortgage."

This language is directly applicable to the present case. At the time of filing the foreclosure bills the mortgagor had lost the property under adverse proceedings instituted by parties having no connection with the mortgage.

The effect of the appointment of a Receiver upon a judgment creditor's bill is to remove the income of the mortgaged property out of the reach of the bondholders. It takes the earnings away from the debtor. They cannot be applied for the benefit of the mortgagee until he procures the appointment of a Receiver in his own suit. In order, therefore, to bring the income within the mortgage, the mortgagee must file his bill and assert his rights.

See

American Bridge Co. vs. Heidelbach, 94 U. S., 798.
Railway Co. vs. Cowdrey, 11 Wallace, 459.

These cases show that it is the right and duty of the trustees to have an immediate appointment of a Receiver of their own, in order to reach the income and earnings applicable to the mortgage security, thereby preventing them from being taken away from both mortgagor and mortgagee and applied to the benefit of a junior judgment creditor.

It would be in the highest degree inequitable to require the trustee to stand idly by for six months after default and allow the security of his *cestuis que trustent* to be absorbed by a general creditor. A trustee neglecting to proceed under such circumstances would be derelict in duty.

But it would be most extraordinary to reverse a decree on the ground asserted when the objection was never made to the Circuit Court in any way whatsoever.

This disposes of the second and third assignments of error.

Fourth. THE COURT WAS NOT BOUND TO REQUIRE THE RECEIVER TO PAY THE INTEREST ON THE BONDS.

I. The fourth assignment of error is to the effect that the Circuit Court erred in directing that moneys in the Receiver's hands should be applied to making improvements of the property, and in not directing him to pay the interest on the bonded debt.

The right and power of a court of equity, having possession of a railway, to make such orders as it may deem necessary to enable the common carrier to perform its duties to the public, needs no argument to support it. The orders were proper and no one ever questioned them or objected to them.

The proposition that it is the duty of a court in a foreclosure suit to ascertain whether or not the mortgagor has property applicable to the payment of the amount in default certainly does require some authority to support it.

It is impossible to cite any authority or to assert a single legal reason why, in a foreclosure suit where there is no defense, a court is bound to inquire as to the ability of the mortgagor to pay his debts.

If it were asserted that no court had a right to foreclose a mortgage upon the real estate of a natural person until it had ascertained whether he was solvent or not or able to pay his debt, the proposition would carry with it its own refutation.

If the rules of law applicable to the foreclosure of a railway mortgage are wholly different from those applicable to any other foreclosures, then it would seem that some authority should be cited to sustain the alleged distinction.

II. It was asserted in the second petition that the bondholders and stockholders of the New Albany Company entered into an arrangement and agreement for the purpose of procuring a sale of the property without the payment of the liabilities of the company *(Record*, p. 193*)*. There is nothing in the way of proof of this allegation, and of course it cannot be considered.

If the bonds were valid the enforcement of the mortgages securing them, which would of necessity have cut off floating creditors and subsequent lien holders, would be neither illegal nor fraudulent. If the bondholders had a legal right to collect their debts by foreclosing the mortgages, they could not expose themselves to liability by exercising that right, and an allegation that it was done with fraudulent intent and purpose would amount to nothing.

McLean vs. King, 144 U. S., 260.

Allegations are contained in the second petition that the Mills bill was filed for the purpose of hindering and delaying the general and unsecured creditors *(Record*, p. 192*)*, and that the bills to foreclose were filed for the same purpose. The case of *Continental Trust Co. vs. Toledo, St. Louis & Kansas City R. R. Co.*, 82 Federal Reporter, 642, was cited to support the contention of the petitioner. In that case the court says of like attacks by intervening creditors:

> "They [the intervening creditors] have no standing in court at all to take part in the distribution of the assets of the defendant debtor, save as they accept the tender of the benefit made to them by the complainant in his bill. If they would be independent of this restriction they are at liberty to put their claims in judgment, and after a *nulla bona* return to file a creditor's bill of their own against any defendants they may select, and under it they may dispute all other claims. But, so long as they owe their right to be in court at all the sufficiency of the averments of the bill for the relief asked, they cannot be heard to question the very basis upon which alone the court can act."

If the charges made by the petitioner against the Mills judgment were true, then under this rule petitioner would have no standing whatever in court ; but in the case cited the court disposes of this question by saying :

"*Undoubtedly an intervening creditor may not defeat the judgment claim of the complainant upon which the bill is founded and the court obtains jurisdiction.*"

In the case last cited, the right of the intervening petitioner to challenge the bonds was put upon the sole ground that the *bondholders themselves* were parties to the creditor's bill, and that the assailing creditor had intervened under the same bill. The court says :

> " In a hearing on a creditors' bill any creditor making himself a party by presenting a claim may be heard to contest the claim of every other creditor seeking payment out of the estate of the debtor. * * * I can see no reason why any creditor intervening in this action under the creditors' bill may not attack the claim of any other creditor seeking the benefit of that bill. The bondholders have made themselves parties to the creditors' bill by a committee of their number, and have set up their claims and lien."

But the court did not hold that a general creditor could intervene in the foreclosure suits and attack the validity of the bonds and mortgages in those suits.

Nor did it hold that a general creditor, who had intervened without questioning the rights of the bondholders, could, after decree of foreclosure and sale, be heard to attack the bonds and mortgages, no intimation of any intention to do so having been given in any manner prior to the entry of the decree.

Fifth. THERE WAS NO ERROR IN REFUSING TO SET ASIDE THE ORDER OF SALE AND IN NOT POSTPONING THE SALE.

The application to set aside the order of sale, so-called, was an application to vacate a decree regularly entered in the cause. If the Louisville Trust Company was a party defendant to the foreclosure bills, with an answer or demurrer on file at the time of the decree and undisposed of, its remedy was by appeal from the decree, and not by motion to set it aside, for in that case the record would have shown that the decree was improperly entered. But, as we have seen, it was not a party, and had no right to appeal.

It then stood in the position of a mere intervenor *pro interesse suo* asking a favor of the Court. Appeals do not lie from such orders.

As to postponing the sale, that also was addressed to the discretion of the Court, and the discretion was properly exercised in refusing the application. If a party to the cause, having taken an appeal from a decree, makes application to postpone, such application will in a proper case be granted; but it is a mere exercise of discretion.

Bound vs. South Carolina R'way Co., 55 Federal Rep., 186.

Sixth. THE COURT PROPERLY DECIDED THAT THE SEVERAL MORTGAGES AND THE BONDS SECURED THEREBY WERE GOOD AND VALID OBLIGATIONS, AND CREATED GOOD AND VALID LIENS UPON THE PROPERTIES EMBRACED IN THE DECREE OF SALE.

It is not easy to see how one who has not raised any question with respect to the validity of the bonds and mortgages by answer or defense in the suit, can be heard upon an appeal to question the propriety of the decree of the Court sustaining the bonds and mortgages, where the corporation has interposed no defense.

The alleged objections to the validity of the mortgages are set forth in the second intervening petition. The sole ground of invalidity alleged is that the mortgagor corporation, which is a consolidated company, was never regularly consolidated, because under the law of Illinois and the decision of the Supreme Court of Illinois in the case of *American Loan & Trust Co. vs. Minnesota Co.*, 47 N. E. Reporter, 153, a railway corporation of Illinois could not be consolidated with a railway corporation of another State.

It may be noted that by the Act of the Legislature of Illinois, approved June 7, 1897, all railway consolidations affected by the decision cited were ratified and confirmed.

The statute is as follows:

"§ 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* That every agreement, whether in form of deed of sale, articles of consolidation, or otherwise, made and entered into between the first day of July, in the year Anno Domini one thousand eight hundred and seventy-four, and the first day of July, Anno Domini one thousand eight hundred and eighty-three, by and between any railroad company organized under the laws of this State or of this State and any other State or States, and any railroad company or companies organized under the laws of any other State or States, providing or purporting to provide for the consolidation or merger of the capital stocks, corporate and other franchises, privileges and property of the respective companies parties thereto, and under which the consolidated company thereby created or attempted to be created, or its successor or lessee, now owns, controls or operates, or is in possession of, the several railway lines of the respective companies, parties to such agreement, be, and the same is hereby, ratified, approved and confirmed; and all the corporate rights, franchises, privileges and immunities of the several and respective companies, parties to every such agreement, are hereby granted, vested and confirmed in the consolidated company thereby created or attempted to be created for and during the term of its corporate existence and of any renewal thereof."

Laws of Illinois (Bradwell), 1897, pages 198, 199.

But there was no property of the mortgagor company in Illinois, except some leasehold interests, and examination of the case in 42 Northeastern Reporter, above cited, will show that it is not in any way applicable to the existing case, and proceeded on grounds peculiar to itself.

Moreover, it is well settled law that in an action to foreclose a mortgage securing bonds of a consolidated corporation of two different States, where from the time of the consolidation it exercised the franchises of a consolidated corporation, without objection from the State or the stockholders, who appeared and voted as its stockholders at its annual meetings, it is a *de facto* corporation, and both such *de facto* corporation and its stockholders, and creditors who claim to be general creditors of the same *de facto* corporation, are estopped

to assert its unauthorized existence as a corporation to avoid the bonds.

Farmers' Loan & Trust Co. vs. Toledo, Ann Arbor & North Mich. Rway. Co., 67 Federal Rep., 49, and cases cited.

Continental Trust Co. vs. Toledo, St. Louis & Kansas City Rway. Co., 82 Fed. Rep., 645.

See also :

Dallas Co. vs. Huidekoper, 154 U. S., 654.

Close vs. Cemetery, 107 U. S., 466, p. 477.

The guaranty upon which appellant's claim is based was made by the same company which made the mortgages.

The appellant, therefore, occupies the singular position of contending that the Louisville, New Albany and Chicago Railway Company was not a corporation having the power to incur a secured debt, but was a corporation having power to incur an unsecured debt.

The Louisville, New Albany and Chicago Railway Company, according to appellant's contention, could make a valid guaranty, but could not make a valid bond and mortgage.

These considerations seem to dispose conclusively of the contention of the appellant as to the validity of the mortgages.

Seventh. THE COURT WAS NOT REQUIRED TO MARSHAL THE ASSETS OF THE COMPANY BEFORE DIRECTING A FORECLOSURE SALE.

Appellant, in the ninth assignment of error, charges that the Court erred in directing a sale of the railroad properties without ascertaining what assets existed belonging to the company.

No such ascertainment was necessary, proper or usual in a foreclosure proceeding.

As to the net earnings of the receivership, the Court reserved full power to inquire in that regard.

There was no legal or equitable requirement that before directing a decree of foreclosure, the Court should direct the net earnings of the receivership to be applied to the payment of interest on the mortgage bonds sought to be foreclosed.

Moreover, no person interested made any application to the Court upon the subject, and the appellant is in no position to assert any such alleged error, because it never called upon the Court to take any such action.

Eighth. THE CONFIRMATION OF THE SALE WITHOUT GIVING TIME TO PARTIES TO FILE EXCEPTIONS WAS RIGHT AND PROPER.

All parties consented to the confirmation. The appellant, as we have seen, was not a party entitled to notice of the application to confirm, because it was never made a party of the cross-bills of foreclosure.

The provisions in Equity Rule 83, respecting exceptions to a Master's report do not apply to a report of a mere ministerial matter like a sale, but only a report upon matters heard and determined by him.

Pewabic Mining Co vs. Mason, 145 U. S., 349.

In that case the Court considers the proper practice upon motions to confirm Masters' sales, which is usually by an order *nisi*, followed, if no objections are taken in the time prescribed by the order, by an order of confirmation. There was no occasion for an order *nisi* in this case, because all the parties entitled to be heard were before the Court and not objecting, and the only object of requiring the report to be confirmed is to afford time, between the service of the order *nisi* and the absolute confirmation of the report, to others to come in and open the bidding, so as to secure the sale of the estate to the best possible advantage (145 U. S., p. 364).

The appellant does not suggest that there was any one in existence who would have come in and made a higher bid, and does not show that its interests were in any way prejudiced by the speedy confirmation.

Ninth. The appellant's contention is largely based upon the fallacy that general creditors of a mortgagor are entitled to intervene in a foreclosure proceeding to attack the mortgage under foreclosure.

A mere intervenor *pro interesse suo* has no right to contest the right to foreclose the mortgage.

To accord to him such a right would reverse all precedent.

The Supreme Court (in *Bronson vs. R. R. Co.*, 2 Black, 524) said :

> " But was it ever seriously maintained that a general creditor, having no specific lien, had a right to interfere in the contests between his debtor and third parties. * * * If the right was conceded to one creditor it would have to be to another, and where the creditors are numerous, as in the case of railroad bondholders, the exercise of the right would lead to great embarrassment."

The proceedings in this case were not conducted in secretly ; they were matters of public notoriety. No step was taken in the forclosure suits in advance of the time when, under the rules, the complainants were entitled to proceed. The appellant, by refusing to proceed in an orderly way, furnishes good reason for the conclusion that its object was not in good faith to procure an adjudication of the merits of the alleged case, but to obstruct and impede the secured creditors in a just and reasonable effort to reorganize an insolvent and defaulting railway corporation.

The objection that proceedings in a court of equity have *not* been allowed to drag for long periods has not often been heard.

There is no legal reason why a mortgage upon a railroad should not be foreclosed as speedily as a mortgage upon an ordinary piece of property, and we know of no rule of law which entitles the creditor of a railway company to assume that such mortgages will not be foreclosed promptly where no defenses have been interposed.

Tenth. The writ of *certiorari* should be dismissed and the decree affirmed.

Adrian H. Joline,
Herbert B. Turner,
George W. Kretzinger,
E. C. Field,
Of Counsel for Appellees.

LOUISVILLE TRUST COMPANY *v.* LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 263. Argued April 24, 1899. — Decided May 22, 1899.

The New Albany Railway Company, whose road was in several States, guaranteed bonds of a Kentucky railway company to a large amount. It attempted by suit to avoid this guarantee as *ultra vires*. Its contention was sustained by the Circuit Court, but that decree was reversed by the Circuit Court of Appeals, and this court has sustained that decision. After the decision of the Circuit Court of Appeals, Mills, a creditor of the company, commenced suit in the Circuit Court of the United States. The company appeared and confessed judgment, and execution was issued and returned unsatisfied. Thereupon the creditor filed a bill praying for the

appointment of a receiver for the entire road, and that the court would administer the trust fund, and order the road sold, and the proceeds from the sale divided among the different creditors according to their priority. The New Albany Company admitted the allegations of the bill, and interposed no objections, whereupon a receiver was appointed. These proceedings took place on the same day. Subsequently proceedings were commenced at different times for the foreclosure of different mortgages, all of which suits were consolidated. Then the Trust Company, as holder of some of the guaranteed bonds, intervened. Then a decree of foreclosure was entered, and a sale ordered, made and confirmed. Then the Trust Company filed another intervening petition, charging that Mills' proceedings had been procured by the New Albany Company for the purpose of hindering and delaying the general or unsecured creditors in the enforcement of their debts, and praying that the decree of foreclosure might be set aside, and other prayers. This was denied, and a sale was ordered. An appeal by the Trust Company to the Circuit Court of Appeals resulted in the affirmation of the decree below. The proceedings being brought here on certiorari, it is *Held* that, under the circumstances as presented by this record, there was error; that the charge of collusion was one compelling investigation, and that the case must be remanded to the Circuit Court, with instructions to set aside the confirmation of sale; to inquire whether it is true, as alleged, that the foreclosure proceedings were made in pursuance of an agreement between the bondholder and stockholder to preserve the rights of both, and destroy the interests of unsecured creditors; and that, if it shall appear that such was the agreement between these parties, then to refuse to permit the confirmation of sale until the interests of unsecured creditors have been preserved.

THE facts in this case are as follows: The Louisville, New Albany and Chicago Railway Company, hereinafter called the New Albany Company, in 1889 and 1890 placed a guarantee upon $1,185,000 of the first mortgage bonds of a Kentucky railroad corporation. In April, 1890, the New Albany Company, guarantor, commenced a suit in the Circuit Court of the United States for the District of Kentucky against divers parties claiming to hold such bonds, to have the guarantee declared void. In 1894 that court rendered a final decree, sustaining its contention, and adjudging the guarantee *ultra vires* and void. 69 Fed. Rep. 431. From that decree the holders of the guarantee bonds appealed to the Circuit Court of Appeals for the Sixth Circuit, which, in June, 1896, reversed the decree of cancellation, and held the guarantee binding. 43

U. S. App. 550. On application of the New Albany Company the case was then removed on certiorari to this court, and at the time of the proceedings hereinafter referred to was still undecided. Judgment therein has since been entered sustaining the guarantee. *Louisville, New Albany and Chicago Railway Company* v. *Louisville Trust Company*, *ante*, 552.

After the decision in the Circuit Court of Appeals, and on August 24, 1896, one John T. Mills, Jr., commenced an action in the Circuit Court of the United States for the District of Indiana, alleging that he was a creditor of the New Albany Company to the amount of $494,911.35. That company appeared and confessed judgment, and an execution was issued and returned unsatisfied. Whereupon Mills filed his bill of complaint in the same court, based upon this unsatisfied execution, and praying the appointment of a receiver. The bill set forth the property belonging to the judgment debtor, the New Albany Company, alleged that its capital stock amounted to $16,000,000, of which $7,000,000 was preferred; that its outstanding funded debt, divided into five classes, amounted to $7,700,000 in six per cent bonds, and $6,100,000 in five per cent bonds. The bill also alleged the existence of a floating debt, amounting to nearly $1,000,000, consisting of outstanding notes and other obligations, held by the complainant and other *bona fide* creditors. It then set forth the guarantee of the bonds of the Kentucky railroad company, the proceedings in court by which the guarantee had been sustained, and averred that the officers of the defendant company reported a diminution of current earnings by reason of a short wheat crop and lessened traffic, and that it would be impracticable to realize from the earnings after the payment of operating expenses, taxes and rentals a sum sufficient to pay the shortly accruing mortgage interest. The bill also alleged many matters, among others the fact that the lines of the New Albany Company were in three different States and subject to the jurisdiction of different courts, which seemed to justify the taking possession of the property by a receiver to prevent its dismemberment or any disturbance of its continued operations as a common carrier. The prayer of the bill was:

"Inasmuch, therefore, as the complainant has no adequate remedy at law for the grievances hereinbefore stated and can only have relief in equity, he files this bill of complaint in behalf of himself and all others in like relation to the said property, and prays that due process of law issue against the defendant, the Louisville, New Albany and Chicago Railway Company, and that it be summoned to appear in this court and answer this bill, but without oath, all answers under oath being hereby expressly waived under the rules to stand to and abide by such orders and decrees as the judges of this court may from time to time enter in the premises; that for the purpose of enforcing the rights of complainant and all other creditors of said insolvent corporation according to their due equities and priorities, and to preserve the unity of the said railway system as it has been and now is maintained and operated, and to prevent the disruption thereof by the separate attachments, executions or levies, this court will forthwith appoint a receiver for the entire railroad. . . . That the court will fully administer the trust fund, in which the complainant is interested as a judgment creditor, and will for such purpose marshal all the assets of said insolvent corporation, and ascertain the several liens and priorities existing upon the said system of railways or any part thereof, and the amount due upon each and every of such liens, whether by mortgage or otherwise, and enforce and decree the rights, liens and equities of each and all of the creditors of the said Louisville, New Albany and Chicago Railway Company, as the same may be finally ascertained and decreed by the court upon the respective claims and interventions of several of such creditors or lienors in and to, not only the said line of railroad, appurtenances and equipment, or any part of them, but also to and upon each and every portion of the assets and property of the said insolvent corporation, and that said railroad and all the assets of such corporation shall be sold by proper decree of the court, and the proceeds divided among the different creditors according as their liens and priorities may be decreed by the court, and for such other and further relief as to the court may seem proper and as may be necessary to further enforce the rights and equities of the complainant and all other creditors of such corporation."

The New Albany Company appeared by its general solicitor, filed its answer admitting the material allegations of the bill and interposing no objections; whereupon the court made an order appointing as receiver a gentleman who was the vice president of the company and its general manager. The order of appointment was in the ordinary form of such orders.

All of these proceedings, including the filing of the original complaint, the confession of judgment, the issue and return of the execution, the filing of the bill and the appointment of a receiver, took place on the same day, to wit, August 24. Up to this time there had been no default in any of the interest due on the several series of bonds. On November 12, 1896, the trustees in one of the mortgages, one executed May 1, 1890, filed a bill of foreclosure, alleging default in the payment of interest on November 1, 1896. On the same day the trustee in another mortgage, dated January 1, 1896, filed a similar bill, alleging default on October 1, 1896. On November, 24, 1896, the court, on application of the receiver, entered an order authorizing the receiver to borrow $200,000 on receiver's certificates, payable out of the earnings, and expend the same in the construction of new bridges, the repair of freight cars and engines, the ballasting and making new alignment of track, and the equipment of engines and cars with air brakes and automatic couplers. What action was taken under this order is not disclosed in the record, although the final decree provided for payment in advance of the bonds "of any indebtedness of said receiver which has not been or shall not be paid out of the earnings and income of the property coming into the hands of said receiver." On the 14th day of December, 1896, the trustee in a mortgage executed September 1, 1894, commenced foreclosure, alleging default on December 1, 1896. On the 21st of December, 1896, an order of consolidation was made of these several foreclosure suits.

On the 23d of January, 1897, the petitioner, the Louisville

Trust Company, filed its petition asking generally to be admitted to appear in the suit and to take such steps and proceedings in its own behalf as it might deem necessary, which petition was sustained, and leave granted accordingly. This petition alleged the indorsement heretofore referred to of the bonds of the Kentucky railway company by the New Albany Company, that it, the petitioner, was the holder of $125,000 of those bonds, and had obtained a decree adjudging the validity of the guarantee.

On the same day the various parties to the foreclosure suits having all appeared and filed so far as was necessary answers admitting the allegations of the bills, a decree was entered foreclosing the three mortgages in suit and directing a sale of the property.

On February 27, 1897, the Louisville Trust Company filed a full intervening petition, verified by affidavit, setting forth the guarantee of the Kentucky bonds, its ownership of $125,000 of them, the decree of the Court of Appeals and the certiorari obtained from this court by the New Albany Company, the proceedings in the action instituted by John T. Mills, Jr., in respect to which it alleged that "the said J. T. Mills, Jr., claimed to be a creditor to the amount of $494,911.35, but did not disclose or discover to the court in his proceedings that he was not a general creditor, but he was at the time, if a creditor at all, secured with collateral securities, the value whereof is unknown to your petitioner. And your petitioner charges that the proceedings in behalf of the said John T. Mills, Jr., were procured by the said New Albany Company for the purpose of hindering and delaying the general or unsecured creditors of the said company in the enforcement of their debts; and that since the entry of the said order of appointment no step has been taken in the said cause, either to ascertain or to bring into court the assets, which are subject to the payment of the said debts, and no proceeding has been taken to notify or to bring before the court the said general or unsecured creditors." It then set forth the filing of the foreclosure bills, the entry of the decree of foreclosure, and alleged "that prior to the entry of the said decree the holders of the bonds secured by the mortgages to the Farmers' Loan and Trust Company and the Central Trust Company aforesaid, and the holders of the preferred and common stock of the said Louisville, New Albany and Chicago Railway Company, or a part thereof, had entered into an arrangement or agreement for the purpose of procuring the sale of the said property, its purchase by and in behalf of the parties entering into such combination and reorganization thereof, and the issue of securities to the said parties, including said stockholders, without the payment of the debts and liabilities of the said company, and for the purpose of hindering and delaying the said creditors and with a view to prevent the collection or enforcement of such debts and liabilities; and that the said decree of sale was obtained by the said company and said complainants in order to carry out such unlawful purpose and to prevent the general or unsecured creditors of the said company from having an opportunity to be heard in matters arising in the said cause."

It also alleged that the New Albany Company was formed by consolidation, and that one of the consolidating companies was a corporation of Illinois and had its property in that State; that it had no power to enter into such consolidation, as had been decided by the Supreme Court of that State, and therefore that the mortgages executed by the New Albany Company and which were being foreclosed were not liens upon so much of its property as had belonged to the Illinois corporation and was situated in that State. It also claimed that under the provisions in the mortgages there had been no such default as justified a foreclosure, and prayed as follows:

"Wherefore, your petitioner prays that the decree of foreclosure and sale heretofore entered in this cause be set aside, that the pretended consolidations herein mentioned be adjudged void, and that the said mortgages before mentioned be declared to be invalid; that this cause be referred to a commissioner to ascertain and report what assets of the said New Albany Company are embraced by any liens, and what are not so included, and the amounts and descriptions thereof; and that, among other things, the master be directed to ascertain what portion of the capital stock has not been paid for, and the amounts due thereon; and that the receiver herein be directed to take steps to enforce the collection of any amounts due to the said company; that due and proper advertisement be given for the proof of debts, and that said master be directed to ascertain and report the names of the creditors herein and the amounts of debts due to them; that it be adjudged that the said master ascertain what net earnings have accrued, and shall hereafter accrue, from the operation of the said railway in the hands of the receiver, and that the amount thereof be adjudged and declared to be a fund to be distributed among the general and unsecured creditors of the said company; and that all such other and further proceedings be had for the sale of the assets of the said company and the distribution thereof, according to law and the rights of the parties."

On the 9th of March, 1897, its petition was denied. On the 10th of March a sale was made by the master appointed therefor, and on the same day his report thereof was filed and the sale confirmed. An appeal was taken by the Louisville Trust Company to the Court of Appeals of the Seventh Circuit, which appeal was argued on the 16th day of November, 1897. On the 5th of January, 1898, the decree of the Circuit Court was affirmed. 56 U. S. App. 208. Whereupon application was made to this court, and the proceedings were brought before it by certiorari.

Mr. Swagar Sherley and *Mr. St. John Boyle* for the Louisville Trust Company.

Mr. Adrian H. Joline for the Louisville, New Albany and Chicago Railway Company. *Mr. Herbert B. Turner*, *Mr. George W. Kretzinger* and *Mr. E. C. Field* were on his brief.

MR. JUSTICE BREWER, after making the foregoing statement, delivered the opinion of the court.

The questions in this case are novel and important. They arise on the foreclosure of certain railroad mortgages, and suggest to what extent the same rules and considerations obtain in them as in the foreclosures of ordinary mortgages upon real estate. It goes without saying that the proceeding in the foreclosure of an ordinary mortgage on real estate is simple and speedy. No one need be considered except the mortgagor and mortgagee, and if they concur in the disposition of the foreclosure it is sufficient, and the court may properly enter a decree in accordance therewith. Other parties, although claiming rights in antagonism to both or either mortgagor and mortgagee, may be considered outside the scope of the foreclosure, and whatever rights they may have may properly be relegated to independent suits.

But this court long since recognized the fact that in the present condition of things (and all judicial proceedings must be adjusted to facts as they are) other inquiries arise in railroad foreclosure proceedings accompanied by a receivership than the mere matter of the amount of the debt of the mortgagor to the mortgagee. We have held in a series of cases that the peculiar character and conditions of railroad property not only justify but compel a court entertaining foreclosure proceedings to give to certain limited unsecured claims a priority over the debts secured by the mortgage. It is needless to refer to the many cases in which this doctrine has been affirmed. It may be, and has often been said, that this ruling implies somewhat of a departure from the apparent priority of right secured by a contract obligation duly made and duly recorded, and yet this court, recognizing that a railroad is not simply private property, but also an instrument of public service, has ruled that the character of its business, and the public obligations which it assumes, justify a limited displacement of contract and recorded liens in behalf of temporary and unsecured creditors. These conclusions, while they to a certain extent ignored the positive promises of contract and recorded obligations, were enforced in obedience to equitable and public considerations. We refer to these matters not for the sake of reviewing those decisions, but to note the fact that foreclosure proceedings of mortgages covering extensive railroad properties are not necessarily conducted with the limitations that attend the foreclosures of ordinary real estate mortgages.

We notice, again, that railroad mortgages, or trust deeds, are ordinarily so large in amount that on foreclosure thereof only the mortgagees, or their representatives, can be considered as probable purchasers. While exceptional cases may occur, yet this is the rule, as shown by the actual facts of foreclosure proceedings, as well as one which might be expected from the value of the property and the amount of the mortgage.

We may not shut our eyes to any facts of common knowledge. We may not rightfully say that the contract of mortgage created certain rights, and that when those rights are established they must be sustained in the courts, and no inquiry can be had beyond those technical rights. We must, therefore, recognize the fact, for it is a fact of common knowledge, that, whatever the legal rights of the parties may be, ordinarily foreclosures of railroad mortgages mean not the destruction of all interest of the mortgagor and a transfer to the mortgagee alone of the full title, but that such proceedings are carried on in the interests of all parties who have any rights in the mortgaged property, whether as mortgagee, creditor or mortgagor. We do not stop to inquire, because the question is not presented by this record, whether a court is justified in permitting a foreclosure and sale which leaves any interest in the mortgagor, to wit, the railroad company and its stockholders, and ought not always to require an extinction of all the mortgagor's interest and a full transfer to the mortgagee, representing the bondholders. Assuming that foreclosure proceedings may be carried on to some extent at least in the interests and for the benefit of both mortgagee and mortgagor, (that is, bondholder and stockholder,) we observe that no such proceedings can be rightfully carried to consummation which recognize and preserve any interest in the stockholders without also recognizing and preserving the interests, not merely of the mortgagee, but of every creditor of the corporation. In other words, if the bondholder wishes to foreclose and exclude inferior lienholders or general unsecured creditors and stockholders he may do so, but a foreclosure which attempts to preserve any interest or right of the mortgagor in the property after the sale must necessarily secure and preserve the prior rights of general creditors thereof. This is based upon the familiar rule that the stockholder's interest in the property is subordinate to the rights of creditors; first of secured and then of unsecured creditors. And any arrangement of the parties by which the subordinate rights and interests of the stockholders are attempted to be secured at the expense of the prior rights of either class of creditors comes within judicial denunciation.

Now, the intervening petition of the petitioner, duly verified, directly charged that the foreclosure proceedings were for the benefit alone of bondholder and stockholder and under an agreement between the two for a sale and purchase for both, and with a view of thereby excluding from any interest in the property all unsecured creditors; that this agreement was entered into after and in consequence of the decree of the United States Court of Appeals adjudging the New Albany Company liable on its guarantee. If that fact be true would it not be, and we quote the language of the Court of Appeals, "a travesty upon equity proceedings"? Can it be that when in a court of law the right of an unsecured creditor is judicially determined and that judicial determination carries with it a right superior to that of the mortgagor, the mortgagor and mortgagee can enter into an agreement by which through the form of equitable proceedings all the right of this unsecured creditor may be wiped out, and the interest of both mortgagor and mortgagee in the property preserved and continued? The question carries its own answer. Nothing of the kind can be tolerated.

Beyond the positive and verified statement of the petition of the Louisville Trust Company are many facts appearing in the record which strongly support this allegation. That a corporation whose stock consists of $16,000,000, $7,000,000 of which is preferred stock, all of which must be expected to be wiped out if a mortgage interest of $13,800,000 is fully asserted, hastens into court and confesses judgment on an alleged unsecured liability; on the same day responds to an application for a receiver and assents thereto; makes no effort during the receivership to prevent default in interest obligations; tacitly, at least, consents to an order made on application of the receiver for the issue of $200,000 worth of receiver's certificates, in aid of betterments on the road, when the same sum might have paid the interest and delayed the foreclosure; when foreclosure bills are filed not only makes no denial, but admits all the averments of mortgage obligation and default — in other words, seems a debtor most willing to have all its property destroyed, and this because of one short wheat crop; these matters suggest, at least, that there is probable truth in the sworn averment of the petitioner that all was done by virtue of an agreement between mortgagee and mortgagor (bondholder and stockholder) to preserve the relative interests of both, and simply extinguish unsecured indebtedness. When, in addition to this fact, it appears that these proceedings are initiated within a few days after a decree of the Circuit Court of Appeals — a decree final unless brought to this court for review in its discretion by certiorari; that a large amount of unsecured indebtedness was by that decree cast upon the mortgagor, we cannot doubt that such a condition of things was presented to the trial court that it ought, in discharge of its obligations to all parties interested in the property, to have made inquiry and ascertained that no such purpose as was alleged in the intervening petition was to be consummated by the foreclosure proceedings.

It is said by the appellee that the Louisville Trust Company was dilatory, and that by reason thereof it was not entitled to consideration in a court of equity. There is some foundation for this contention, and yet there was not such delay as justified the court in refusing to enter upon an inquiry. Indeed, it does not appear that either the Circuit Court or the Circuit Court of Appeals considered the petitioner dilatory or denied its application on the ground of delay. It must be borne in mind that the bill of complaint filed on August 24 by one who had that day become, by consent of the defendant, a judgment creditor, was affirmatively "for the purpose of enforcing the rights of complainant and all other creditors of said insolvent corporation according to their due equities and priorities," and to "decree the rights, liens and equities of each and all of the creditors of the said Louisville, New Albany and Chicago Railway Company as the same may be finally ascertained and decreed by the court upon the respective claims and interventions of several of such creditors or lienors in and to not only the said line of railroad appurtenances and equipment or any part of them, but also to and upon each and every portion of the assets and property of the said insolvent corporation."

Although this bill was filed in the avowed interest of himself and all other creditors, no action was taken to notify any creditors or to bring them into court to present their several claims. Any creditor might well have waited, even with knowledge of what had taken place, and after an examination of the bill thus filed, until publication or other notice. Whether this petitioner was, in fact, aware of these proceedings is not disclosed. Even if it were, its waiting a reasonable time for what in the ordinary course of procedure all creditors had a right to expect, is not a neglect which destroys its equities. It, and all other creditors, might justly assume that this proceeding was initiated in good faith to subject the property of the common debtor to the payment of all its debts; primarily it may be its secured debts, but also generally all its debts, secured or unsecured, and that whenever it was necessary due notice would be given and all creditors called upon to present their claims. It would not have been justified in treating this proceeding as solely in the interest of the mortgagee and mortgagor, the bondholder and stockholder, and for the purpose of destroying all claims of unsecured creditors.

It is true that the filing of the bills of foreclosure was notice of an intent to subject the property belonging to the mortgagor to the satisfaction of the mortgage. And for the purposes of the present inquiry it may be conceded that the intervening petition disclosed no legal defence to the claims of the mortgagees to foreclosure. In other words, for the inquiry we desire to pursue we shall assume without question that the matters referred to in the petition in respect to the property in Illinois, the decision of the Supreme Court of that State and the effect of the attempted consolidation, and all other matters stated or suggested, separately or together, constitute no valid defence to the foreclosure bills. But this foreclosure proceeding did not either directly or by suggestion disclose any purpose to protect the mortgagor, the stockholder, at the expense of unsecured creditors. And, as heretofore stated, this unsecured creditor was not bound to presume that there was any such purpose in the minds of the two parties to the foreclosure. So that its failure to intervene at the first instant cannot be fatal delay or neglect.

It is also true that no evidence was offered by the petitioner in support of the allegations of its petition, but it is not true that in revising and reversing the final action of the Circuit Court we are acting on mere suspicion, or disturbing either settled rules or admitted rights. The allegations of this intervening petition as to the wrong intended and being consummated were specific and verified. The delay, under the circumstances, was not such as to deprive the petitioner of a right to be heard. The facts apparent on the face of the record were such as justified inquiry, and upon those facts, supported by the positive and verified allegations of the petitioner, it was the duty of the trial court to have stayed proceedings, and given time to produce evidence in support of the charges. Taking them as a whole, they are very suggestive, independent of positive allegation; so suggestive, at least, that, when a distinct and verified charge of wrong was made, the court should have investigated it.

We cannot shut our eyes to the fact that one claiming to be a general creditor for nearly half a million of dollars commences proceedings to establish his right, which, by the consent of the debtor, result on the very day in a judgment, execution and return thereof unsatisfied, a bill for a receivership and the appointment of a receiver; and yet notwithstanding this was initiated in support of this large claim, as well as for the protection of other unsecured creditors, shortly thereafter foreclosure proceedings are instituted and carried on to completion, which absolutely ignore the rights of this alleged unsecured creditor, and leave as the result of the sale himself, the actor who has brought on the possibility of foreclosure, stripped of all rights in and to the mortgaged property. Was he a real creditor, and did that real creditor make a generous donation of this large claim? Were arrangements made with him and the stockholders to protect both, and by virtue of such arrangements was this foreclosure hastened to its close? Questions like these which lie on the surface of these proceedings cannot be put one side on the suggestion that they present only matter of suspicion.

It is no answer to these objections to say that a bondholder may foreclose in his own separate interest, and, after acquiring title to the mortgaged property, may give what interest he pleases to any one, whether stockholder or not, and so these several mortgagees foreclosing their mortgages, if proceeding in their own interest, if acquiring title for themselves alone, may donate what interest in the property acquired by foreclosure they desire. But human nature is something whose action can never be ignored in the courts, and parties who have acquired full and absolute title to property are not as a rule donating any interest therein to strangers. It is one thing for a bondholder who has acquired absolute title by foreclosure to mortgaged property to thereafter give of his interest to others, and an entirely different thing whether such bondholder, to destroy the interest of all unsecured creditors, to secure a waiver of all objections on the part of the stockholder and consummate speedily the foreclosure, may proffer to him an interest in the property after the foreclosure. The former may be beyond the power of the courts to inquire into or condemn. The latter is something which on the face of it deserves the condemnation of every court, and should never be aided by any decree or order thereof. It involves an offer, a temptation, to the mortgagor, the purchase price thereof to be paid, not by the mortgagee, but in fact by the unsecured creditor.

We may observe that a court, assuming in foreclosure proceedings the charge of railroad property by a receiver, can never rightfully become the mere silent registrar of the agreements of mortgagee and mortgagor. It cannot say that a foreclosure is a purely technical matter between the mortgagee and mortgagor, and so enter any order or decree to which the two parties assent without further inquiry. No such receivership can be initiated and carried on unless absolutely subject to the independent judgment of the court appointing the receiver; and that court in the administration of such receivership is not limited simply to inquiry as to the rights of mortgagee and mortgagor, bondholder and stockholder, but considering the public interests in the property, the peculiar circumstances which attend large railroad mortgages, must see to it that all equitable rights in or connected with the property are secured.

While not intending any displacement of the ordinary rules or rights of mortgagor and mortgagee in a foreclosure, we believe that under the circumstances as presented by this record there was error; that the charge alleged positively, and supported by many circumstances, of collusion between the bondholder and the stockholder, to prevent any beneficial result inuring by virtue of the decree of the Circuit Court of Appeals for the Sixth Circuit in reference to the guarantee obligations of the New Albany Company, was one compelling investigation, and the order will, therefore, be that the decrees of the Circuit Court and of the Circuit Court of Appeals be reversed and the case be remanded to the Circuit Court, with instructions to set aside the confirmation of sale; to inquire whether it is true as alleged that the foreclosure proceedings were made in pursuance of an agreement between the bondholder and stockholder to preserve the rights of both and destroy the interests of unsecured creditors; and that if it shall appear that such was the agreement between these parties, to refuse to permit the confirmation of sale until the interests of unsecured creditors have been preserved, and to take such other and further proceedings as shall be in conformity to law.

Decree accordingly.

MR. JUSTICE PECKHAM dissented.